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No. 752

In The Supreme Court of The United States

# PETITION FOR WRIT OF CERTIORARI

Docket No. 752, October Term, 1956

Donald H. Jacobs
*doing business as*
THE JACOBS INSTRUMENT COMPANY,
Petitioner

vs.

THE UNITED STATES OF AMERICA,
Respondent

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PETITION FOR REVIEW OF JUDGMENT OF THE
U. S. COURT OF APPEALS FOR THE FOURTH CIRCUIT
AFFIRMING DECREES OF THE
U. S. DISTRICT COURT FOR THE DISTRICT OF MARYLAND,
AT BALTIMORE

CIVIL

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## Abbreviations Used Herein

| Abbreviation | Meaning |
|---|---|
| ADM | Admiral |
| BuAer | Bureau of Aeronautics (of the Navy) |
| BuOrd | Bureau of Ordnance (of the Navy) |
| CDR | Commander |
| CNO | Chief of Naval Operations |
| Def. Ex. | Defendant's Exhibit No. ____ |
| DPA | Defense Production Administration |
| Gov. Ex. | Government's Exhibit No. ____ |
| LCDR | Lieutenant Commander |
| LT(jg) | Lieutenant, junior grade |
| JAINCO | JAcobs INstrument COmpany electronic navigation system |
| NOPI | Naval Ordnance Plant, Indianapolis |
| Re | Research and Development Division, Bureau of Ordnance |
| Re8 | Aviation Ordnance Branch |
| Re8d | Bombardier-Operated Fire Control Section (i. e. Bombsight Section) |
| JAINCOMP | JAcobs INstrument Company COMPuter |
| Def. App. | Defendant's Appendix |
| Gov. App. | Government's Appendix |

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SECTION I

Jurisdictional Statement

The petition of The Jacobs Instrument Company respectfully represents:

1. The petitioner and original defendant herein, The Jacobs Instrument Company, is a sole proprietorship, located at 4718 Bethesda Ave., Bethesda, Maryland. It is wholly owned and operated by Donald H. Jacobs whose place of residence is 4711 Overbrook Road, Bethesda, Maryland.

2. The petitioner has no knowledge of the existence of any official or unofficial reports of the opinions delivered in the courts below.

3. The petitioner seeks review of the decrees of 13 December 1955 and 29 December 1955, and a Court Order of 10 February 1956, all entered in the U. S. District Court for the District of Maryland, at Baltimore. The Court Order of 10 February 1956 denied a motion for a new trial filed by the petitioner. Cross-appeals were filed by both parties; these were argued on 13 November 1956 before the U. S. Court of Appeals for the Fourth Circuit, and the judgment of the District Court was affirmed by the Court of Appeals on 22 December 1956. The judgment of the Court of Appeals is reviewable under 28 U.S.C. 1254 (1) by writ of certiorari.

SECTION II

Legal Questions

The questions presented for review are as follows:

(1). Are technical data to be considered as "property", subject to protection under the principles established for the protection of property in the Fourth and Fifth Amendments to the U. S. Constitution?

We think the answer to this lies clearly in the affirmative; yet the matter, which is a most vital one, has never been firmly established in the Courts, and particularly in the Supreme Court. In the instant case the courts below appear to have given minor lip service to an affirmative declaration of this principle, but the decrees in question distinctly and sharply negate this principle, for they convey to the government both technical data acquired by the defendant at his own expense and technical data compiled under the instant contract, although the conveyance of neither is authorized by the contract or any recognized principle of law or equity, and although there existed a clear and distinct agreement between the parties that no such conveyance would be demanded or made.

(2). Can the information in the technical data and engineering drawing files of a government contractor be seized by the Navy for its own use, and for the use of favored commercial organizations, without the existence of any legal or equitable reason for such action, and in spite of specific covenants that there would be no attempt to acquire this material?

In the instant case the petitioner conceived (and filed a patent application on) a new type of electronic navigational system for aircraft, and then conceived and proposed to the Navy a bombing system based on this device. A contract was awarded to the petitioner for the design and construction of a working model of this bombing system. During the course of the work a sequence of new inventions, of great military and commercial value, were developed. As the work moved to a climax, great pressure was brought to bear on the contractor by the Navy to force the contractor to merge, on giveaway terms, with a firm selected by the Navy. Also, when, during the Korean War, the Chief of Naval Operations issued a directive stating an urgent battlefield requirement existed for the bombing system being developed, the Navy attempted to force the contractor to degrade the quality of the bombing system to admit certain favored organizations to the work. When the contractor demurred at degrading the system, there were intensified efforts to force a giveaway merger on him; when he refused his contract was immediately terminated.

Following the termination the contractor worked for the Navy for a period of nine months, without receiving a cent of fee therefor, preparing a final report of work accomplished and inventorying equipment and material associated with the work. During this period the contractor segregated approximately 1,000 of about 2,000 confidential company drawings and turned them over to the Navy voluntarily to help it continue the terminated work. The Navy then instituted suit to gain access to all other drawings, notebooks, and other documents connected with this work. The defendant resisted this attempt on the following theories: (a) The desired technical data embodied ideas and conceyts which were acquired by the defendant over many years, and in effect represented the fruits of his entire professional career, and the efforts of his organization over a much longer period of time than was covered by the Navy contract. (b) A specific agreement had existed between the defendant and the Navy that the retention of all technical data generated during the progress of the work was to be part of the defendant's reimbursement for the performance of the work.

(c) The contract made provisions for certain technical disclosures, and these provisions were honored to the fullest extent by the defendant. (d) No provisions of the contract required or permitted the type of disclosure here sought by the Navy. (e) No equitable basis exists for this type of disclosure, the Navy having acted most inequitably, and having come into Court with unclean hands. In addition, its case in Court was based on maliciously false documents and testimony. (f) In addition to giving the Navy access to the documents which were generated in connection with the Navy contract (although these documents contained technical information generated earlier than the contract, by the contractor's unaided efforts), the Court's decrees also gave the Navy access to (and the right to use) any technical documents prepared "in anticipation of" the Navy contract. The Navy interpreted this as a license to seize anything in the contractor's files, whether related to the contract or not.

The Government's case appears to be basically an assertion of need of the contents of the contractor's files, and its case appeared to have little reference either to equitable or legal principles. It seems to the petitioner that an assertion of need is proper in a condemnation proceeding, or when reasonable means for the acquisition of the desired property are not available, but it would appear to have no place in a suit of this nature.

The District Court hemmed and hawed as to whether the suit was one in law or in equity, not being able to find a basis in either for what it wished to award the Navy. Neither the opinion of the District Court, nor that of the U. S. Court of Appeals, gives any solid legal or equitable basis for the decrees in question, for there is none. Both referred vaguely to the general principle of shop rights (which relates exclusively to implied patent licenses), which principle has nothing whatever to do with the question of disclosure of technical data, nor to the property rights therein.

(3). Is a Government contractor an "employee" of the Government whose technical data are subject to arbitrary search and seizure by virtue of his "employment"?

We think the answer is clearly in the negative; yet this principle has been postulated by both the District Court and the Court of Appeals in justifying the search and seizure of the defendant's technical data. The precedent sought to be established here is horrifying indeed, for it is far-reaching in the extreme.

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(4). Is there a general federal common law strong enough to overturn the specific terms of a Government contract?

The District Court justified the decree giving the Government the right to search and seize all the defendant's technical data by stating, in its opinion of 1 December 1955, "This is in accord with the general law." We feel that the notion of the existence of a body of federal common law was removed by Erie R. Co. v. Tompkins, 304 U. S. 64, and that the instant decrees are in violation of the principle laid down therein.

(5). Can the Government, by an assertion of need, effectively change the terms of a contract?

In the instant case, the contract in dispute obviously does not authorize the relief demanded by the Government. The Government overcame this problem by (among other things) an insistent assertion of need of the desired relief. The courts below have responded sympathetically to this assertion of need, in spite of the fact that the desired relief could have been obtained by the Government by a variety of lawful means, and despite the fact that the actions of the courts below strike a massive blow at the sanctity of contracts. The general implication is that a firm working on important projects cannot rely on the terms of a Government contract, while

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working on important projects cannot rely on the terms of a Government contract, while a firm working on unimportant matters is in a more favorable position in this respect. It would appear that this is contrary to public policy.

(6). The Court of Appeals has stated, in this case, "Furthermore, it is clear that, without regard to the contract, the government is entitled to the benefit of all knowledge gained by the contractor in the course of the research for which the government was paying him." Is this true?

While the above quotation is phrased in a somewhat deceptive manner (the government was not paying for the research, it was paying for the end-product), nonetheless the policy it asserts is extremely important, and basic to this case. It is either right or wrong, and this point requires determination. In the eyes of the defendant, this policy completely violates the principle of the sanctity of contracts, and will have extremely serious and far-reaching effects on our economic system. Either a contract means what it says, or, alternately, as in the instant case, the contractor's entire property will be seized on the theory that the government is entitled to all knowledge gained by the contractor in the course of his work, and anything else the government wants to seize at the same time.

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(7). Is it a legitimate objective of the U. S. Government to attempt to force a merger, on a no-reimbursement basis, upon a highly successful small business doing work vital to the national defense, and to destroy that business deliberately and cold-bloodedly when its owner refuses to give his business away?

The uncontested evidence in this case shows clearly that for over a year prior to the termination of the instant contract the defendant was placed under extreme direct pressure by the Navy, at the direct orders of the Chief of the Bureau of Ordnance, to merge with organizations selected by the Navy on a no-reimbursement basis. This pressure increased to a crescendo immediately prior to the termination of the instant contract, and continued after that termination. These facts were admitted by the trial judge. It was his opinion that if the Navy desired that the defendant give his company away, the defendant should have given his company away. He bitterly condemned the defendant as being "utterly intransigent" in refusing to do so, and stated he felt that this intransigence was clearly a proper justification for termination of the contract. It was further admitted by the judge that it had been proven that the Navy had blocked off all the company's defense business in its attempt to force a merger, and this was also admitted by the U. S. Attorney.

It is the defendant's position that the Government's attempts to force a merger of any sort (and particularly a no-reimbursement merger) were illegal and improper; that (as admitted by the trial judge) his refusal to so merge was related to the termination of the instant contract; that this termination was therefore improperly motivated and the acts flowing from that termination (including the decrees in question) are to be considered illegal.

(8). Is a government contract to be considered to be terminated in the best interests of the Government when it covers a very important defense project; when the contractor who conceived the project and carried it through to the point at which it was terminated is deemed by the cognizant Government official to be the only contractor qualified to carry the project through to completion; and when the contract is terminated under circumstances where the contractor is threatened that unless he contributes his company (including all assets) to an organization designated by the Navy, his contract will be terminated?

The defendant had to present his defense on this subject under almost unbelievable circumstances in the District Court: he had no counsel (the Court refused to grant him sufficient time to obtain one after his earlier counsel had withdrawn), he was not permitted by the Court to summon witnesses (although he asked permission to do so), and he was granted only two days for the preparation of his defense (although he asked the Court for adequate time. Even under these circumstances, the defense presented by him convinced the Court that the Navy had been engaged in improper activities, although the Court would not concede that it saw a relationship between the improper activities and the termination. It may be noted in passing that this conclusion of the Court was in conflict with conclusions reached by the staffs of two Senate committees. It may also be noted that the White House investigated the matter, and concluded that the termination of the contract was not in the best interests of the government, and attempted unsuccessfully to get the contract reinstated. Later in the case, at a hearing on a motion for a new trial, the trial judge admitted the connection between the defendant's refusal to merge and the termination of his contract, but he took the position that the termination was reasonable punishment for the refusal to merge.

(9). Has the important principle of equity, "He who demands equity must come into court with clean hands" been abolished, or is the Government in a special category of litigants to which this principle does not apply?

We think it is clearly evident that this principle is basic to the whole theory of equity, and that when the Government comes into court to assert a claim, it does so as a private litigant and cannot escape the consequences of its improper actions.

(10). Did the District Court act, in this case, as an arm of the judiciary, or as an arbitrary administrative panel of the Executive Branch of the Government whose function was the condemnation of private property without compensation, in violation of the Fifth Amendment of the U. S. Constitution?

A few examples of the lapses from due process which occurred in this case are the following:

1. The attempted intimidation of the defendant by the judge, who told the defendant through his counsel that he would be severely criticized in the final opinions, and would be badly treated on his counterclaims (he was finally awarded one-third of what was due to him) if he presented evidence concerning improper behavior of Navy officials.

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b. The immediate withdrawal of the defendant's lawyers following the above episode, when the defendant refused to abandon his defense, coupled with the refusal of the judge to grant a continuance for the obtaining of other counsel.

c. When the defendant persisted in pursuing his defense, he was required to present it <u>without counsel</u>, and with only <u>two days</u> of preparation. Furthermore, he was required to present it <u>without witnesses</u>, although he requested the court's permission to summon witnesses.

d. The Government was able to obtain a transcript of a major portion of the trial testimony in time to use it during the later portions of the trial, but the defendant was not able to get even that portion of the transcript for another six months (and six months of continuous battling, at that), and then he found that the transcript he was sold had been grossly altered.

e. During the trial the judge continuously monitored the work of the U. S. Attorney, interjecting many suggestions as to how to present his case more effectively and savagely criticizing him when he blundered. The judge stated repeatedly and openly that he was an employee of the Government, and that it was his job to get for the Government whatever the Government wanted.

f. A major portion of the government's case was built on testimony which was later conclusively proven by the defendant, at a hearing on a motion for a new trial, to have been completely and maliciously false. A number of the Government's exhibits were documents which were conclusively proven, at the same hearing, to be maliciously fraudulent. The judge shrugged away the significance of the false documents, asserting that such things are used frequently by the Government and hence one cannot properly object to their use. When the falsity of government testimony was proven, the judge used various defenses on behalf of the government, one of which was that this case was a contract dispute, not a perjury case, and hence the defendant couldn't properly raise the issue of false testimony.

g. After the trial, when the defendant attempted to get other counsel to proceed with an appeal, a Washington lawyer whom he interested in the case journeyed over to Baltimore to look at the file of the case. The attorney was invited into the judge's office, and the judge told him that the defendant had had a fair trial and that the matter was to be considered closed. Scared at this display of unseemly pressure, the lawyer told the defendant that he could not undertake a case where there was such a display of improper forces at work.

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Many other gross lapses from orderly and fair judicial processes also occurred in this case, and the question as to whether there has been due process of law can well be raised. This point will be better understood after the facts have been reviewed. One can even seriously question whether we are not reverting to methods and practices which had been considered outlawed by the Magna Carta.

(11). Must a defendant in a suit give up his right to sue on other issues related to the same contract, but not related to the instant suit, in order to obtain the relief granted in the suit?

In the instant case, the defendant was required to permit the Navy to make microfilms of all his technical data (whether related to the contract or not, and whether compiled under the contract or not), and these microfilms were deposited at the District Court. The Navy was required to deposit a check for approximately $20,000 (representing payment of about one-third of what it owed the defendant for expenditures by the defendant under the contract) with the District Court in order to receive the microfilm, and was also required to file an agreement not to appeal. The defendant was required to sign a complete release (including a waiver of all right to future legal action) in order to get the $20,000. The Navy refused to deposit the $20,000, contending that the District Court did not have jurisdiction over the counterclaims in the case, and appealed against the requirement that it forego the appeal to obtain the microfilm. The defendant appealed against the requirement that he waive his right to have recourse to legal methods in other matters that required adjudication. With reference to the Government's appeal on this point, the Court of Appeals found that the District Court had been in error in this matter. With reference to the defendant's appeal, the Court of Appeals was silent.

(12). Was the District Court justified in awarding the defendant only one-third of his counterclaims?

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## SECTION II-A

### Excerpts from Pertinent Documents

Those sections of the Constitution of the United States which are involved in this action are the following:

(a) From the Fifth Amendment: "No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

(b) From the Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . . ."

Those sections of Contract NOrd-10,531 between The Jacobs Instrument Company and the Department of the Navy which are of most immediate concern to the questions here at issue are:

From Schedule A, pp 1-2: "Pursuant to the provisions of Article 1, Scope of Contract, the following Task is hereby assigned:

Task 1: Conduct research in connection with, develop, design, construct and test a (deleted) bombing system incorporating the SHINE ground and airborne position determining elements. The foregoing work shall include the following: . . .

(f) A set of reproducible drawings, prepared to Bureau of Ordnance specifications, for all the equipments developed under this contract will be supplied to the Department of the Navy. Appropriate operating instructions will also be supplied."

"Article 17. Reports of Work

(a) The Contractor shall submit to the Chief of the Bureau of Ordnance from time to time, as requested, progress reports in triplicate making full disclosure of all work done and the results thereof, provided that the Contractor shall not be required to submit reports more frequently than once each month during the term of the contract. The Chief of the Bureau of Ordnance or his duly authorized representative shall at all reasonable times have full access to the work being performed under this contract.

(b) At the completion of the task, or at the termination thereof, if not complete, the Contractor will submit a complete report in triplicate of all work done and the results thereof, together with working drawings and specifications of such prototypes, if any, as may have been developed."

"Article 23. Termination by the Government

(a) Notice of Termination of Contractor's Right to Proceed. The performance of work under this contract may be terminated by the Government in whole, or from time to time in part, whenever for any reason the Contracting Officer shall determine any such termination is for the best interests of the Government. Termination of work hereunder shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract shall be terminated and the date upon which such termination shall become effective.

(b) Certain Obligations of the Contractor. After receipt of a Notice of Termination and except as otherwise directed by the Contracting Officer, the Contractor shall . . . (6) transfer title (to the extent that title has not already been transferred) and deliver to the Government in the manner, to the extent and at the times directed by the Contracting Officer . . . (ii) the plans,

drawings, information and other property which, if the contract had been completed, would be required to be furnished to the Government . . .

* * * *

(d) In the event of the failure of the Contractor and Contracting Officer to agree as provided in paragraph (c) upon the whole amount to be paid to the Contractor in connection with the termination of work pursuant to this Article, the Government, but without duplication of any amounts agreed upon in accordance with paragraph (c), shall pay to the Contractor the following amounts:

(1) All costs and expenses reimburseable in accordance with this contract, not previously paid to the Contractor for the performance of this contract prior to the effective date of the Notice of Termination and such of these costs as may continue for a reasonable time thereafter with the approval of or as directed by the Contracting Officer (which approval shall not be unreasonably withheld), provided, however, that the contractor shall proceed as rapidly as practicable to discontinue such costs."

From Amendment No. 3, p. 3:

The inventions described in Patent Application No. 60,731, filed on 18 November 1948 by Donald H. Jacobs, and entitled "Position Finding and Distance Measuring Systems", shall not be considered as Subject Inventions under this contract. The expression "Contractor's Patent Rights" will be understood to include all rights the Contractor has to the aforementioned Patent Application and to any Patent or Patents which may be issued based upon disclosures made in the aforementioned Patent Application.

The fact that the Contractor has not requested royalties under this particular procurement will not be construed as establishing a precedent of any sort, nor shall it be interpreted as waiving the Contractor's right to request royalties on future procurements."

With respect to the question as to whether the Courts have authority to review the termination of the contract by the Contracting Officer, 41 U.S.C. 321 provides:

"No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

## SECTION III

### Facts

The factual matter relating to this case is very complex. It cannot be abstracted or paraphrased in a simple fashion, for the leaving out of relevant facts or attempting to compress them into short statements simply leads to great confusion. The petitioner well understands the necessity for conserving the time of the Justices of this Court, but he feels that any abbreviated version of the facts which leads to confusion through arbitrary deletions will lead to great waste of time, for time spent on confusing or diffuse material is certainly lost. So, the facts will be presented here with as much brevity as possible, but the presentation will nevertheless be fairly lengthy.

The Jacobs Instrument Company, of Bethesda, Md., is a proprietorship owned by Donald H. Jacobs. Because Mr. Jacobs, the defendant in this action, acts as both President and Technical Director of the Company, he sets the general course of both its business and its technical policies and programs, and has done so from the formation of the Company. Because of the importance of the background of Mr. Jacobs and The Jacobs Instrument Company to this case, both will be reviewed briefly.

Donald H. Jacobs received his high school training in New Jersey, and was elected to membership in the National Honor Society. His undergraduate college training was received at Rutgers University. Here he majored in Physics, and taught this subject during the last two years of his undergraduate work. He was elected to Phi Beta Kappa and other honor societies, and graduated with a B. S. in Physics in 1936, in the Rutgers U. Honor School.

He spent one year at Duke University, doing full-time graduate work in Physics and simultaneously teaching a full-time schedule of Physics courses. He completed all requirements (including original research in spectroscopy) for a Master's degree in this year and was awarded an M. A. in Physics in 1937. He next became employed as an electronic engineer and physicist by the Arcturus Radio Tube Company, where he performed research and did product development work in electronics and in colorimetry and did a good deal of trouble-shooting in manufacturing operations. After a year of such work he resigned and set up a consulting organization which did a wide variety of consulting and design work, primarily in the field of optical instruments (cameras, enlargers, etc.). He was employed as an optical engineer by the Ilex Optical Company in Rochester, N. Y. in 1939, and did design work on lens systems and photographic shutters for them. He spent his nights in Rochester pursuing a full-time course of study in optics at the University of Rochester, and in one year completed all requirements (including original research in optics) for a Master's degree.

In 1940 Mr. Jacobs was employed as a physicist by the Plastics Division of the Celanese Corporation. With this organization he developed new plastics for industrial and military use, and a series of instruments for use in measuring the properties (such as gas diffusion, scattering power, color, heat stability, thermal expansion, etc.) of plastics. He also did some development work on new manufacturing processes, and was used as a trouble-shooter when unusual production troubles developed.

In January 1942 Mr. Jacobs became employed as a physicist at the National Bureau of Standards in Washington. He was concerned primarily with the design of rangefinders, and rangefinder testing instruments. Here he conceived a new type of anti-aircraft fire control system, and did the necessary research and development work, and administrative work, to bring the system (known officially as the Fire Control System T-29) into existence. At the Bureau of Standards he also acted as an official consultant to many government agencies on various problems of optics, most of them relating to military optical instruments. During this period Mr. Jacobs taught various courses in applied optics and optical instrument design in the evenings at The George Washington University. During this period he also wrote the book "Fundamentals of Optical Engineering" which was published by McGraw-Hill in 1943. Also in 1943 Mr. Jacobs was transferred to the U. S. Naval Observatory as Senior Physicist, where he had cognizance over the development of navigational instruments for the Navy.

In 1944 Mr. Jacobs became employed as a physicist at the U. S. Naval Ordnance Plant, Indianapolis (known as NOPI), which at that time was operated by a subsidiary of Carl L. Norden, Inc. Here he had charge of a group which was developing toss bombing systems (bombsights), and he also conceived and developed various types of devices for use in other aircraft fire control systems. He acted as a consultant on bombsight design to Carl L. Norden, Inc., and did much field work on the testing of fire control systems and components. He also acted as a consultant on the manufacture of such devices.

At the end of the war Mr. Jacobs left the Naval Ordnance Plant and became employed as a Project Supervisor in the Physics Department of the University of New Mexico. He had charge of a project which operated under a contract with the Bureau of Ordnance of the Navy. His job was to find a practical method for the attainment of high

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velocities with ordinary guns, and this involved theoretical research in ballistics, the design and use of ballistics instruments, the design of ammunition and guns, etc. The project was carried through successfully, and projectile velocities far in excess of any hitherto possible were attained.

In 1946 Mr. Jacobs became employed as a Supervisor in the guided missile laboratory of North American Aviation, Inc. He built a section of 4 men into a group of about 60. He and his group developed auto-pilots for guided missiles, instrumentation for wind tunnels and rocket test stands, etc. They did the original design work on the guidance system for the Navaho intercontinental missile, and they conceived, developed, built, installed, and placed in operation the system of instrumentation (and also a launching tower, blockhouse, fueling system, etc.) used at the Holloman Air Force Base at Alamogordo, New Mexico. This work included the development of radars, timing systems, telemetering equipment, phototheodolites, photographic devices, and many other devices. It was a project of major magnitude, and was carried through under a variety of difficulties to successfully meet a very stringent time schedule.

In April of 1948 Mr. Jacobs established The Jacobs Instrument Company in Bethesda, Maryland. The company, at the outset, consisted of himself and two employees. The company was interested primarily in contracting with the Armed Forces for the development of military devices and systems conceived by Mr. Jacobs. A number of new devices were conceived, and their properties were evaluated by engineering studies (called Design Studies by The Jacobs Instrument Company). Proposals for the development of these devices were submitted to the Armed Forces. In the fall of 1948 Mr. Jacobs conceived a new high-precision electronic navigational system for aircraft. This system had a number of advantages over existing navigational systems, and a patent application was filed thereon. The system was given the name JAINCO, which was derived from Jacobs Instrument COmpany. In the fall of 1948 the defendant described the JAINCO System to a number of government agencies, including the Bureau of Ordnance (hereafter called BuOrd) of the Navy.

At this point a brief comment will be made on the organization of BuOrd, for an understanding of this is very important. The Bureau of Ordnance is headed by a Chief, an officer of Rear Admiral grade. The Bureau is divided into divisions: Material, Contracts, Research and Development, etc. The defendant's dealings were with the Research and Development Division, known by the code symbol, Re. It is to be noted that the head of an organization in BuOrd is known by the same symbol as the organization. Thus Re is the symbol used to designate the head of the Research and Development Division, and this type of symbol eliminates much burdensome nomenclature. The Research and Development Division was divided into branches, numbered in sequence, and the branch with which the defendant was concerned was Re8, the Aviation Ordnance Branch. This branch was divided into sections, designated by letters, and the one with which he was concerned was Re8i, the Bombardier-Operated Fire Control Section (or Bombsight Section). Research and Development contracts in the Bureau of Ordnance were monitored by these sections (known as the technical sections) in the Re division. While contract forms and amendments required nominal approval in the Contract Division (and signature by the Contracting Officer), contract terms and changes were originated in, and recommended by the technical sections.

To get back to the main course of the narrative, in 1948 the defendant had conceived the JAINCO electronic navigational system, and his company had done a good amount of preliminary engineering on it. This system was described to various government agencies, in the fall of 1948, including Section Re8d of the Bureau of Ordnance. The head of that section, LCDR W. G. Puryear, had had considerable acquaintance with the professional qualifications of the defendant, and had seen some of his work in bombsight design. Puryear was not particularly interested in the JAINCO System, however. His superior, CDR Eugene Tatom (head of Re8), and his advisers, Mr. Kenneth Knight (a physicist) and Mr. J. Miller (an electronics engineer), were enthusiastic about JAINCO and suggested to Mr. Jacobs that he conceive and propose to the Navy a bombing system utilizing JAINCO to determine the position of an aircraft relative to the position of a target to be bombed. Mr. Jacobs accordingly did conceive such a system, worked out the preliminary details, and prepared a proposal on this system. This system proved of great interest to the Navy representatives, and on 19 January 1949 a contract (Contract NOrd-10471) was awarded to The Jacobs Instrument Company by the Navy. This contract was of a type known as a "study contract", and it authorized further engineering studies (slide rule work, on paper) on the proposed bombing system. This contract employed the same standard printed provisions or "boiler plate"

(NAV ORD Form 1568) as the contract here in dispute (Gov. Ex. 1).

At the time this contract was signed The Jacobs Instrument Company still consisted of the defendant and two employees, and its equipment consisted of a few electrical instruments and a few tools. This situation was well known to the Navy, which had thoroughly inspected the company's facilities. Why did the Navy contract with a small, poorly equipped company for a major bombsight development project? In military research and development, the difficulties (both technical and administrative) are great, and the financial return (a very small fixed fee) is very small. For example, it can be noted that a bombsight laboratory costs at least $2,000,000, and this will support spending of about $600,000 per annum. Assuming a fixed fee of 7%, this brings a return of $42,000 (before necessary expenses and income tax are taken out) on this investment. The rate of return is less than 2% (usually less than 1%). Furthermore, any Government contract can be arbitrarily terminated without notice at any moment (as was the contract here in dispute), and this means a total loss of the investment, as a bombsight laboratory is not well adapted to civilian pursuits. No investor is ever willing to invest a large amount of money in elaborate facilities under such circumstances. Hence the Government provides facilities for companies which have shown genuine ability to get a job accomplished (the large aircraft companies obtain about 80% of their facilities from the government), and the government enters into a gentlemen's agreement with the contractor to give him an equitable share of the production contracts for the items he develops with so much labor and so little direct reward. Such a gentlemen's agreement was entered into between representatives of the Navy and The Jacobs Instrument Company. The first contract (NOrd-10471) provided for the performance of mathematical work only, but the next contract (NOrd-10531, Gov. Ex. 1) provided for experimental work, and the contract made provision for the Contractor to obtain some needed laboratory equipment with contract funds (title to the equipment passing to the Government).

In addition to the gentlemen's agreement mentioned in the preceding paragraph, there is one other important element in research and development contracting that must be kept in mind. When such a contract is entered into, it is necessary that the Contractor gather a highly-skilled technical staff from all over the United States. These men have to sell their homes and re-establish their households in the vicinity of the Contractor's plant. There is a distinct understanding that as long as the organization produces successful work the Government will not wreck the project and disorder the lives of the scientists who make very real personal sacrifices to engage in it. While there were no written agreements on this point, it was discussed between the Contractor and the Government, and an understanding of the type indicated above was arrived at. It was necessary for the defendant to assure prospective scientist-employees that there would be continuity to the project (if it were successful), and he had to give his personal word on this, and this in turn was based on assurances received from the Navy, assurances which admittedly have no great legal significance, but which are quite important in judging the issue of good faith.

The first contract called for the delivery of nothing, although it contained the standard boiler plate Article 17 entitled "Reports of Work". Nothing was asked for during or after the contract, except for some informal verbal requests for copies of some of the Contractor's file memoranda. Why should the Government contract with a Company, and ask for nothing under the Contract? The answer is tied up in the realities of research and development. If it is desired to have a new type of bombsight developed, it is necessary to perform a large amount of research and development work whose basic purpose is to educate the staff of the Company. At the end of some years of research and development this staff (if the work has been performed properly) is then capable of building the desired bombsight. It would be possible to attempt, via extensive continuous report writing by the staff members, to keep the Government apprised of the findings of the staff. When this is desired, it is spelledout in the contract. However, it is very costly and time consuming, and in this era of limited scientific manpower it greatly lengthens the time required for completion of the work because staff members must devote a very great portion of their time to report-writing instead of advancing the work. So, in this project, no report writing was required, and no funds were budgeted for this purpose (Def. Ex. 4). In fact, a specific agreement to this effect was reached during the first contract with the project officer, LCDR Puryear, and was reaffirmed during the second contract by each successive project officer.

During the period of per-

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formance of both contracts the Contractor gave various file memoranda to the project officers, on request, and there was no dispute, until the Government decided to terminate the contract, over the transmittal of technical data.

Work under the first contract proceeded to the satisfaction of the Navy, and during its performance The Jacobs Instrument Company submitted its Proposal No. 33 (parts of which appear as Gov. Ex. 4 and Def. Ex. 4) for the expansion of its modest study program on this project (which had involved only mathematical work, and no experimental work thus far) into a full fledged research and development program. As a result of this Proposal, Contract NOrd-10531 (Gov. Ex. 1) was negotiated, and signed on 15 April 1949. This is the contract here at issue. It consists of two major parts, a Schedule describing the specific task to be carried out under the Contract, and a printed boiler plate containing provisions about reimbursement, accounting, security, etc., etc. The description of the task set forth in the Schedule is the Contractor's language, and the rest of the contract, including the boiler plate, represents the Government's language.

The general statement of the task in the contract is "Conduct research in connection with, develop, design, construct and test a** bombing system incorporating the JAINCO ground and airborne position determining elements". (The starred word was deleted by the Navy for security reasons). It will be noted that this task statement does not call for the delivery of the bombing system, for this contract only carried the project through the construction and testing of the first working model, which was naturally expected to be crude and imperfect, and it was expected that the first prototype for production purposes would be evolved under a succeeding contract.

The above task statement was amplified by six lettered paragraphs, and the only one of these calling for the delivery of anything is paragraph (f) which states, "A set of reproducible drawings, prepared to Bureau of Ordnance specifications, for all the equipments developed under this contract will be supplied to the Department of the Navy. Appropriate operating instructions will also be supplied." Now, during a research and development program, the scientists are performing experiments day by day. A man may, for example, build an experimental circuit, and modify it day by day for several weeks or months before it works properly. Even after it works, it may later be abandoned because some better circuit has been found. So, if you keep track of all the day-by-day changes of each piece of equipment under development, you keep a tremendous staff of draftsmen busy making perfectly worthless drawings, for all the intermediate stages of development are of no interest, and what the Navy wanted was a set of drawings of the final equipment under the program. Hence it was agreed by the Government and the defendant that no drawings would be prepared pursuant to paragraph (f) of the task statement until the end of the contract, and none were prepared. The defendant did prepare some less formal drawings for internal use in his organization. Some of these were voluntarily turned over to the Government; others are at issue in this case.

It is particularly to be noted that the task statement did not call for the writing of progress reports. It is further to be noted that nothing in the contract requires the disclosure of the contents of the contractor's technical files. This permission (which arises under the principle, what is not included is excluded) for him to retain and use the technical information acquired in the course of the work under the contract was the most valuable reimbursement he was promised for the performance of this work, and the decrees which strip him of this form of reimbursement deprive him of property which he was specifically promised by the Government, and which is clearly his by the most strict interpretation of the contract terms.

The boiler plate of the contract contained the following article:

"Article 17. Reports of Work

(a) The Contractor shall submit to the Chief of the Bureau of Ordnance from time to time, as requested, progress reports in triplicate making full disclosure of all work done and the results thereof, provided that the Contractor shall not be required to submit reports more frequently than once each month during the term of the contract. The Chief of the Bureau of Ordnance or his duly authorized representatives shall at all reasonable times have full access to the work being performed under this contract.

(b) At the completion of the task, or at the termination thereof, if not complete, the Contractor will submit a complete report in triplicate of all work done and

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the results thereof, together with working drawings and specifications of such prototypes, if any, as may have been developed."

In accordance with the above-described understanding that the major part of the Contractor's reimbursement was to come, as is standard industry practice, in the form of having acquired certain know-how under the contract, only a few simple reports were requested by the Navy under Article 17 (a), and the Contractor made available to the Navy some file memoranda when this was necessary to aid in their understanding of the course of his work. The most definitive statement on Article 17(a) is to be found in defendant's Exhibit 21, which is a statement to a Senate investigating committee prepared, shortly after the contract was terminated, by the Office of Counsel of BuOrd and signed by Admiral M. F. Schoeffel, Chief of BuOrd. This states (p. 7): "It should be noted, however, that while the research and development contract called for drawings prepared to Bureau of Ordnance specifications and progress reports, from time to time, making full disclosure of all work done and the results thereof, the Bureau of Ordnance, realizing the limited number of the personnel of the company and the time and cost involved in preparing such in customary form, accepted selected company working memoranda for files in lieu thereof from time to time." During the course of the contract the defendant submitted all reports and memoranda requested of him in fulfillment of this clause.

The final report mentioned in Article 17(b) was prepared, submitted to the Navy, and accepted, as will be mentioned subsequently.

At the time the contract was signed, it was estimated that the total cost of performance would be $525,540.00. The contract stated, however, " *** neither the Government nor the Contractor guarantees the accuracy of such estimate of cost." The contract required the Contractor to keep working on the project as long as money was put into it by the Navy, but permitted the Navy to cut off the work at any time, if this was found to be in the best interests of the Government.

At the time the contract was signed, the Navy only had $75,000 available for the work, and the contract states, "There is at this time being appropriated and allocated to the contract the sum of $75,000.00, including a fixed fee of $5,132.00. This amount shall not be exceeded until the contract is amended to provide additional funds, and allocation of any additional amount to this contract shall be subject to the limitations of available appropriations." Hence money was added to the contract, from time to time, as it became available.

The contract provides " *** the Contractor shall not be required to continue performance of the contract unless and until the contract is amended to increase the appropriated funds apportioned to the contract or the total estimated cost, as the case may be." The meaning of this is quite clear. Nevertheless, during the trial of this case, the Government persuaded the Court that negotiations for the continuation of the contract were blocked by unreasonable demands of the defendant (for salary increases and the like). In spite of the terms of the contract quoted here, which obligate the contractor to continue the work as long as funds are made available, and in spite of the testimony of the defendant that the alleged demands were never made, the Court found in its opinions of 1 and 14 December 1955 (Def. App. 1 and 3), " *** the parties were never able to agree to an extension of the contract because of various non-technical reasons involving the salary to be paid to Mr. Jacobs and various other matters which are listed in the correspondence, and need not be detailed here." Even when the defendant proved by a tape recording (Def. Ex. 3 of 9 Feb. 1956) at a hearing on a motion for a new trial that the Government's story of the contract foundering on his alleged demands was completely unfounded in fact, he was unable to move the Court from its position.

When the work for the development of this bombing system (which was subsequently designated the Bomb Director System Mark 6, and was also designated AN/ARB-1) began, the first project officer was LCDR Puryear, who was also head of Re8d. This officer monitored the project in both administrative and technical areas, being qualified for the latter role by virtue of his college degree in physics. He was a most competent and conscientious officer, and during his regime the project flowered most promisingly. His attitude was, "I know enough about the administrative and technical problems of weapons research and development not to meddle in a project which is moving forward rapidly and successfully." This officer's attitude toward the project at the outset was one of mild skepticism, for while he had considerable faith in the ability of The Jacobs Instrument Company to carry the project through successfully, and while he was

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convinced that the project was technically feasible (although very difficult), he did not feel that there would be very much military application for this bombing system. As will be narrated below, from time to time he tried to divert the efforts of the defendant into areas he felt might be more fruitful to explore, but the defendant resisted this pressure because he was convinced of the military usefulness of the Mark 6 system, and for another reason to be mentioned below.

Getting this program under way was a task of considerable magnitude. There was the problem of getting equipment. There was the problem of building up a really good scientific staff. This was necessary, for only a very small amount of money had been budgeted for what was clearly going to be a very large project. The budget was based on the company employing a maximum of 10 scientists and engineers (Def. Ex. 4), and a project of this sort is normally conducted with from 300 to 500 technically qualified men. So, a major project had to be conducted on a shoestring budget, and this meant that every man would have to carry his weight; there could be no deadheads. It also meant that the defendant had to go to extraordinary lengths to get the project moving within the limits of his budget: he personally swept out toilets, and spent his weekends printing stationery to avoid drawing on his extremely limited funds.

The Bomb Director System Mark 6 is a bombing system of the navigational type, that is, an electronic navigational system (JAINCO) determines the location of the aircraft relative to the target. The system has to provide some means for determining where in space the bomb must be released to hit the target. The location of this point is determined by many things such as aircraft altitude, air speed, ground speed, wind, etc. These quantities must be measured by sensing instruments and fed into a computer which takes these quantities and combines them in complex mathematical relationships to determine the bomb release point. This computer is one of the vital parts of the bombing system.

In developing such a system, one starts with a system analysis, which is a complex mathematical study of the inter-relationships of the various portions of the system. The objective of the system study is to determine how accurate the various parts of the system must be to achieve the desired bombing accuracy, and how fast the various parts of the bombing system must work, and various other characteristics of the system components.

The Mark 6 project started with a system study of the type described in the preceding paragraph, and this study revealed certain unexpected results. For one thing, it had been expected to employ an analog type of computer (i. e., a computer in which an analogy exists between some quantity such as airspeed, and a physical quantity, such as a shaft rotation, in the computer -- for example, each degree of rotation of a shaft in the computer could represent 1 mile-per-hour, and thus 100 degrees of rotation would represent 100 miles-per-hour). The trouble with the analog type of computer is that it is quite limited in accuracy, because its accuracy is limited by the electrical and mechanical tolerances to which it is built. In other words, it is impossible to manufacture perfect parts for an analog computer, and a surprisingly small defect in a part can lead to very large errors. All previous bombing systems and bombsights had employed analog computers, and had accordingly suffered from the limited accuracy of these devices.

The early system studies showed that the JAINCO navigational system was so accurate that, in order to take full advantage of this accuracy in bombing, it would be necessary to have a very accurate computer: one with far more accuracy than was attainable with the best analog computer. These studies also showed that the computer would have to be very fast. This requirement arose out of the fact that the computation of the bomb release point involves factors such as aircraft altitude, air speed, ground speed, wind, etc. The aircraft may be changing its altitude or speed as it approaches the target, and at each new altitude the bombing problem is different. In other words, as the aircraft changes altitude or speed continuously, the solution of the bombing problem (i. e., the location of the bomb release point) changes continuously. Hence the computer must be able to attain new solutions of the bombing problem practically instantaneously. A computer capable of doing this is called a "real time computer", for it can solve a problem in real time as quickly as the various quantities which are fed into the computer can change.

At the time it was found that an analog computer would not be sufficiently accurate for the Mark 6 system (this was early in 1949), there had come into existence the giant electronic computers known popularly as "giant brains". These were

typified by machines at that time such as the ENIAC, or by more modern giant computers such as the UNIVAC. These computers were not of the analog type; rather they were of a type called "digital computers". In these computers, each digit in a number is counted separately, as one counts on the digits of one's hands, but this is done at electronic speeds. The advantage of these digital computers is that they can be made with any desired accuracy, and their accuracy is not determined by the accuracy of the parts of which they are constructed, as is the case with analog computers. Hence the thinking of Mr. Jacobs turned toward the application of digital computers to the Mark 6 bombing system. The obvious difficulties were two in number: although the "giant brains" had adequate accuracy for bombing, they weighed tons, and couldn't be used in aircraft because of their tremendous size and weight, and, secondly, they were far too slow to be able to solve bombing problems in real time. Too big and too slow were the major problems, but there were a host of minor ones, too. The "giant brains" were very unreliable, and were out of operation a large portion of the time. A bombing computer has to be practically infallible, for men's lives are risked on bombing missions, and if you risk them to no avail, you are treating your airmen badly indeed. Then, too, inaccurate bombing can land bombs on your own troops instead of on the enemy's (as happened frequently during World War II), and this must be avoided at all costs. In other words, when you are talking about bombing accuracy, you are talking about saving American lives as well as destroying your enemies'.

In the spring of 1949 Mr. Jacobs told LCDR Puryear that he felt that he would have to develop a digital computer for use in the Mark 6 system. Puryear said that such a device would undoubtedly revolutionize bombing, as well as other military areas such as missile guidance, anti-aircraft fire control, etc., but that he did not believe that a small, fast, reliable airborne digital computer could be built, because this had been attempted by the Bureau of Standards and the Massachusetts Institute of Technology, and both organizations had failed and had reported that the job could not be done. He said he could not obligate Navy money to an assignment which, desirable as it appeared, seemed reasonably to have little prospect of success. Mr. Jacobs offered to build a first working model of his idea without formal authorization on the understanding (a gentlemen's agreement) that formal authorization would be given to continue the work if the first model worked and showed promise. Puryear discussed the matter with his superiors; then agreed. Work was started on this first machine, which was designated JAINCOMP-A (from the initials JAcobs INstrument Company COMPuter, Model A).

Meanwhile, the system study showed another unexpected fact. To understand this fact, it is only necessary to remember that even a perfect computer gives the wrong answer if the wrong information is fed into it. If the various instruments, such as altimeters or airspeed indicators or gyros, feed inaccurate information into a computer, the computer will of course compute an inaccurate bomb release point, even though the computer itself is very accurate. The system study showed that all aircraft instruments in existence at that time were of far too low accuracy to be used with the digital computer that was now proposed. When the project had been started, it had been expected to use conventional instruments, but the system study showed that a large number of radically new instruments, of very superior accuracy, would be required. The development of such instruments had not been contemplated when the contract had been signed, and no funds had been budgeted for this purpose. However, the contract placed on the defendant the obligation of developing a complete bombing system, and so he decided resignedly that he would have to develop all these new instruments (which would increase his task by about 50%) without asking for a cent of additional funds or a cent of additional fee. This decision was communicated to the Navy and was received with gratification. By the late spring of 1949 the staff of The Jacobs Instrument Company had expanded to a total of 7, and the work began to move forward with great rapidity in a number of directions. The Navy expressed itself as being greatly pleased with the progress of the work. Development of JAINCO components, the JAINCOMP-A digital computer, the various new input instruments for the computer (altimeter, gyro, etc.), as well as the system studies, all moved forward.

At about this time LCDR Puryear told Mr. Jacobs of a problem in tactical bombing, as applied to the close support of infantry, that had been encountered by the Marines, and he asked Mr. Jacobs to conceive a new bombing system which would solve this problem. After some study Mr. Jacobs conceived a bombing system called JAINTAC (for JAcobs INstrument Company TACtical Bombing System), and revealed this to LCDR Puryear. Puryear discussed this with his superiors, and with the Marines, and found great enthusiasm for the system. He suggested to Mr. Jacobs that work be stopped on the Mark

6 system and shifted to JAINTAC, this suggestion being in keeping with Puryear's general feeling that there was no great tactical need for the Mark 6 system. Jacobs resisted this pressure (which kept recurring over a period of several years) because he felt there was a genuine tactical use for the Mark 6 system, and because he felt that inasmuch as the new techniques he was developing were coming to fruition in the Mark 6 system, these new techniques could be developed quicker by continuing the Mark 6 work rather than scrapping it and starting in on JAINTAC. Furthermore, once the new techniques (and these were new navigational techniques, new computing techniques, and new instrument techniques) had been brought to a final stage of development in the Mark 6, they could then be rapidly applied to JAINTAC and other military uses.

In 1950 JAINCOMP-A was completed and demonstrated to the Navy. It caused a sensation because of its widespread implications in many military fields. A flood of industrial and military visitors to the Jacobs plant now began, all these visitors being sent by the Navy with military clearances. The military people were interested in the wide variety of military weapons systems that could result from further application of the new Jacobs techniques. The industrial visitors were interested primarily in the numerous accounting and other commercial uses of a low-cost, desk-size, highly-reliable digital computer which was far faster than any of the "giant brains". These visits contained the seeds of ultimate disaster to the Mark 6 program.

Work began on a new experimental digital computer which was to be greatly advanced in concept and performance over JAINCOMP-A, the new machine being called JAINCOMP-B. The Navy began to apply pressure to Mr. Jacobs to expand his organization beyond the size contemplated under the existing contract (Def. Ex. 4) in order to exploit his new techniques. He was more than willing to expand, but the problem was one of getting a bigger and more suitable laboratory. He spent a full year in searching for a more suitable rental facility, but the combined requirements of suitable space and power, proper zoning, etc., etc. could not be met, although the problem was discussed repeatedly with a large number of prominent realtors in the Washington metropolitan area. In May of 1950 the Navy indicated officially that it wanted the Jacobs organization to undertake pilot production of the Mark 6 system.

In June 1950 the Korean War started, and a month later LCDR Puryear visited Mr. Jacobs and told him that the Navy was experiencing very serious troubles with a bombing system, designed by Norden, which was in use, and was intended for a different purpose than the Mark 6. The onset of the Korean War made the deficiencies in this Norden equipment assume considerable importance. The faults lay, according to Puryear, primarily in the computer (an analog device), which was both very unreliable (subject to very frequent total failure) and very inaccurate (giving inaccurate bombing). It was suggested by Puryear that Jacobs quickly develop a JAINCOMP digital computer for use in this faulty Norden bombing system. Jacobs pointed out to Puryear that his company's facilities were saturated with the Mark 6 work, and that if he took on additional work, without acquiring expanded facilities, it would prejudice both programs. He also pointed out that the faulty bombing system had some basic design weaknesses that extended beyond the computer, and hence the addition of a JAINCOMP computer to that system would not clear up all the troubles. He also pointed out that the JAINCOMP computers were digital devices, whereas the faulty bombing system was of analog type throughout, and extensive engineering modifications would be required to adapt it to a digital computer. He suggested that he devote some of his spare time at home trying to work out a new bombing system to replace the faulty one, which new system would be digital in nature throughout, and would overcome the other basic design weaknesses of the faulty system. Puryear agreed to this course of action, and it was further agreed that more study would be given to the problem of the expansion of facilities.

Jacobs spent a number of months studying the bombing problem that Puryear had posed to him, and eventually evolved a tentative design which met all requirements. The resulting bombing system was a radically new one, and Puryear and his superiors were very enthusiastic about it. This was an element which led to greater Navy pressure for expansion. It might be noted that the defendant proved, during the trial of this case, by Defendant's Exhibit 15 and a Navy stipulation (Transcript, p. 945) that this design was defendant's property; yet the Court's decrees give the Navy legal access to this material, and Paragraph (d) of the Patent Article of the contract converts access into a specific right to use.

On 16 December 1950 LCDR Puryear requested that The Jacobs Instrument Company undertake quantity production of the faulty Norden bombing system, stating that other

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firms in this field had tried to put that system into production, but were experiencing great difficulty. Jacobs stated he was willing to take on this assignment if the Navy insisted, but recommended strongly against it because it would have involved an immediate expansion of his company of several hundred times, and this seemed too much to be practical. He also recommended against massive production of a bombing system which appeared to him to be basically weak in design. He recommended that his idea of developing a sounder, much more easily producible, bombing system be adopted.

In the fall and winter of 1950 the Navy made two formal requests of The Jacobs Instrument Company to undertake development of its JAINTAC tactical bombing system. The Company again pointed out that it could not start work on JAINTAC without stopping work on the Mark 6 because of the saturation of its facilities with the Mark 6 program. It again pointed out that expansion of its facilities was the only way to make possible an expanded program of development work. At the request of the Navy it again made a survey of the possibility of obtaining expanded facilities. The defendant discussed this problem with real estate firms and private investors but the only practical suggestions that were made dealt with the possibility of having a plant constructed for the Company. Several investors stated they were willing to do this if they could get a five year lease. The defendant could not sign such a lease on the basis of a Navy contract that could be (and eventually was) terminated without any notice, so he asked the Navy if it would be willing to guarantee such a lease. The Navy had legal authority to do this, but stated that it did not wish to do so. This left the matter of expansion at an impasse. At this time Navy pressure for expansion arose from three sources: a modest desire on the part of the Navy for some speed-up of the Mark 6 program, and a strong desire on its part for the Jacobs organization to undertake both the JAINTAC program, and the development of the new electronic bombing system which was to replace the faulty Norden system. There was also considerable Navy interest in various other new weapons systems that had been conceived and proposed by Mr. Jacobs.

Meanwhile, work on the JAINCOMP-B computer was approaching completion, and work was moving forward on the JAINCO navigational system and on the various instruments which were to feed information into the computer. Interest in the work of the Jacobs organization continued to be exhibited by representatives of Government and industry.

Early in 1951 (specifically, on 26 January) LCDR Puryear and his immediate superior, the head of Re8, visited Mr. Jacobs and asserted their continued desire for an expansion of Jacobs' facilities from 6,000 sq ft to 150,000 sq ft. It was mutually agreed that this was an appreciable expansion, but it was also agreed that such an expansion was necessary in view of the Navy's requirements for reliable and accurate bombing systems. This meeting was followed by other discussions and meetings with the same objective: the expansion of the Jacobs facilities. However, study of the problems of expansion by all concerned led to an agreement that to jump from 6000 sq ft to 150,000 sq ft at one time was a pretty big affair, and might prove troublesome. So it was finally agreed that an expansion to 60,000 sq ft (30,000 sq ft for a laboratory, and 30,000 sq ft for pilot production purposes) appeared reasonable. On 19 March 1951 Puryear requested Mr. Jacobs to compute what would be needed in the way of funds for the entire expansion, including acquisition of land and improvements, the construction of the building, and the equipping of the plant. He requested Mr. Jacobs to file an application for a loan to cover this project under Section 302 of the Defense Production Act of 1950 together with an application for a Certificate of Necessity. In accordance with this request The Jacobs Instrument Company filed an application for such a loan with the National Security Resources Board on 27 March 1951, and an application for a Certificate of Necessity. The loan was to be in the amount of $2.75 million dollars. The loan application flowed through various Government channels to the Office of Naval Material, whence it was referred to BuOrd for a recommendation.

It is to be particularly noted that under the Defense Production Act and various Executive Orders for the administration of that Act, the authority for deciding whether such a loan would be granted, and the authority for deciding whether such a loan was a sound business risk, were assigned to the Defense Production Administration. This organization was responsible for the funds that Congress had appropriated for such loans. The only part the Dept. of Defense, or any of its branches, was supposed to play in these matters was to advise DPA as to whether a <u>military</u> requirement existed for the proposed plant.

The application for this loan kept "getting lost", and this delayed it for some

months. However, each time it got "lost", the Jacobs organization sent someone down to the Navy Department to find it, and eventually it reached the Bureau of Ordnance. On 7 June 1951 a meeting to discuss this application was held at the Navy Department. A number of Navy and Jacobs representatives attended. The Navy's chief spokesman was a Mr. R. Muir, an executive of the General Electric Co. who apparently was on loan to the Navy, and who was acting as the "adviser" to the Chief of Naval Material (Mr. Muir stated he actually gave orders to the Chief of the Office of Naval Material). Mr. Muir stated that he would not permit the loan to be approved (see Memo which is part of Def. Ex. 10) because he did not approve of the expension of small companies. He said he felt small companies could not expand successfully. He added that small companies could not put up large collateral for loans. When it was pointed out that the Defense Production Act specifically stated that the loans it authorized were for use in situations where bank loans could not be obtained, Mr. Muir replied that he would not approve any loan under that act that did not involve the same amount of collateral that a bank would accept. It was pointed out that if such collateral were available, the loan could not be gotten under the Defense Production Act. It was also pointed out that the Government would be perfectly protected on the loan as it would have a mortgage on the land, plant, and facilities until the loan was paid off. As the loan would be paid off much faster than the plant would depreciate, and as a good rate of interest would be paid as well, the Government could not avoid making money on the loan as well as having 100% perfect protection of its investment. Mr. Muir replied that General Electric had facilities available in which the Government could place any work it wanted, and that while those facilities were available he would not permit this loan to go through. It was pointed out that a shooting war was in progress, and that The Jacobs Instrument Company had know-how that was needed to save American lives, but such considerations left Mr. Muir unmoved. He did say, however, that if the pilot-production plant part of the proposed new facility were removed, and if the project was reduced to a small laboratory, he might be willing to permit its passage.

This conference was followed by several discussions with BuOrd representatives as to what step should be taken next. On 20 June 1951 LCDR Puryear requested Mr. Jacobs to eliminate the 30,000 sq ft of pilot-production area (to which Mr. Muir objected) from the proposed loan, and to scale the whole thing town to a 30,000 sq ft laboratory. Mr. Jacobs agreed to this, and the next day he hand-transmitted to the Navy a letter authorizing this reduction. It is to be understood that the agreeing to the deletion of the pilot-production facilities was not an easy thing for Mr. Jacobs, for if defense spending should slacken, or should his contract arbitrarily be cut off at any time by the Navy, the only way he could pay off the loan was to convert the manufacturing area to civilian production. Accepting a large loan for a bombsight laboratory alone, without any production area, left him in an awkward position for, in the event of cut-off of his military funds, he would undoubtedly find very few civilian customers for bombsight research. He had discussed this intensively with Navy representatives, but they kept harping on the nation's needs for the various proposed weapons systems, Mr. Jacobs' duties as a citizen, etc.

There was a good deal of discussion about loan details, and finally the defendant was asked to file a new application for a loan for the smaller (30,000 sq ft laboratory) facility. This was done on 9 August 1951. Some opposition to the loan began to appear at a high level in the Bureau of Ordnance. To understand this, it is necessary to understand the close relationship that existed between the Bureau of Ordnance and the Norden organization (the organization which built the Norden bombsight). To understand this relationship it is only necessary to give consideration to a few of the key Norden officials. Consider the Technical Director of the Norden organization. Before World War II this man worked as a Navy employee, testing and approving for accuracy the Norden bombsight whose inaccuracy cost many American lives during the war. During World War II he became technical director of the Norden organization, and a Navy consultant. After World War II he again became a Navy employee, and had charge of the testing of the faulty Norden bombing system which the Jacobs organization had undertaken to replace. His tests had resulted in that sight being approved for production. Next he left the Navy and again became a Norden official (technical director) when that faulty bombing system was placed in production. Then he became Deputy Assistant Secretary of Defense for Research and Development, and next a Norden vice president (and simultaneously a Government consultant). The two top administrative officials were two brothers, one of whom had been the chief negotiator for BuOrd immediately before going with the Norden organization.

The extremely close relationship between Norden and BuOrd is clear.* One can readily imagine with what enthusiasm those participating in this relationship greeted the thought of the Jacobs organization getting a new laboratory to develop a bombing system to replace the faulty Norden system. The tenseness of this situation was greatly heightened when, during the summer of 1951, LCDR Puryear pointed out to his superiors that the analog techniques in use by Norden were not producing militarily acceptable bombing systems, whereas the completely new techniques developed by the Jacobs organization were leading to new weapons systems of greatly improved performance and reliability, and reduced cost. He recommended that the Bureau of Ordnance shift the major part of its emphasis on bombsight development from the Norden organization to The Jacobs Instrument Company. The result of this recommendation was immediate and violent: LCDR Puryear was relieved immediately of his position as head of Re8d.

As soon as the reduced loan application (which was now in the amount of $1.695 million dollars) was referred to Mr. Muir for a recommendation, he blocked it with some insolently frivolous objections. By late August 1951 it had become clear to Mr. Jacobs that he was heading into very stormy waters with this loan application: it had irritated General Electric's man in the Office of Naval Material, and it had caused violent reaction at the top in BuOrd because of its implied effect on the Norden company. Mr. Jacobs accordingly telephoned LCDR Puryear on 27 August 1951 and suggested that the loan application be withdrawn because it was obviously irritating very powerful people, and appeared to be leading everybody to disaster. Puryear agreed that the loan application and the success of the Mark 6 work had set powerful influences at work, but he pointed out that the nation was at war, and needed the [illegible] under development by the defendant, and urged that the loan application not be withdrawn. The defendant acceded to this request.

LCDR Puryear was relieved of his position immediately, an officer who had been slated for another position was given his job. Puryear was retained for a few months in advisory capacity while the Navy could decide where to ship him. The new head of Re8d was CDR J. J. Hinman, III. Hinman tried gently to move the loan application forward, but found he was blocked by Mr. Muir, and could get no assistance from Admiral M. F. Schoeffel who was now Chief of the Bureau of Ordnance. Hinman stated that without vigorous support from Adm. Schoeffel, he could not hope to overcome Muir's resistance to the loan, and he spent several months diplomatically trying to win Schoeffel's support. He had Admiral Schoeffel and a group of key BuOrd officers visit The Jacobs Instrument Company on 14 November 1951, in the hope he could get Admiral Schoeffel's support for the loan. However, about the only result of the visit was an interesting and significant letter from Admiral Schoeffel to the defendant, dated 27 December 1951 (Def. Ex. 8) which reads as follows:

DEPARTMENT OF THE NAVY
Bureau of Ordnance
Washington 25, D. C.

In reply refer to
P15
27 DEC 1951

Mr. Donald H. Jacobs
Jacobs Instrument Company
Bethesda 14, Maryland

Dear Mr. Jacobs:

Some weeks ago I had the pleasure of visiting your company to observe work being done for the Bureau of Ordnance. Your discussion of the development program was most interesting, as was the demonstration of your present digital computer.

The problems confronting your company in this project appear to have been solved in very ingenious fashion. Your general policy of building up the computer from standard commercial parts assembled into units by semi-skilled employees is unusual and noteworthy.

You and your staff are to be congratulated on the excellent progress you have made. I have been particularly impressed by the valuable work you have done without elaborate facilities and by the initiative shown in

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* After World War II, two top Norden officials and a BuOrd officer were indicted for conspiracy to sabotage bombsight production at the plant of a competitor of Norden. One Norden official is understood to have committed suicide, and the charge against the BuOrd officer was dropped because he was already in prison. Numerous other examples of the Norden-BuOrd relationship could be cited.

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improvising test fixtures and other necessary equipment. I appreciate the management attitude which gives the Navy maximum development effort per contract dollar by such economies of operation.

Sincerely yours,

/s/ M. F. Schoeffel

M. F. SCHOEFFEL
Rear Admiral, USN
Chief, Bureau of Ordnance

Note the most significant sentence in this letter, the last sentence, which reads, "I appreciate the management attitude which gives the Navy maximum development effort per contract dollar by such economies of operation." This sentence has been cleverly garbled in the trial Transcript (p. 901), in accordance with the Government's sub rosa behind-the-back assault on the defendant as being a poor business man, to read "I appreciate the management attitude, which gives the Navy maximum development effort per contract dollar, by such employees of the operation."

Several weeks after Admiral Schoeffel's visit, CDR Hinman advised the defendant that the loan was dead. He did state, however, that word had been passed down from higher levels in BuOrd that if the defendant would merge with a big company, everything would be straightened out and the loan would go through. This advice was repeated several days later by CDR Hinman's immediate superior.

The Navy had requested The Jacobs Instrument Company to train one of its key electronics specialists, LCDR William T. Doyle, in fire control system development techniques. LCDR Doyle was at that time studying in the Navy's Postgraduate School, and the Navy suggested he be assigned to the Jacobs plant for a few months as part of his training. Mr. Jacobs was asked to undertake this training at no expense to the Government, and agreed to do so. LCDR Doyle reported to the Jacobs plant on 2 January 1952, and remained there for several months, becoming familiar with the Mark 6 program and the general techniques being developed by Jacobs, as well as with the various economic problems peculiar to weapons research.

In this general time period (1951-52) Mr. Jacobs was approached by both the Army and the Air Force with respect to his undertaking development work for their organizations. When he pointed out to them that he had limited facilities, both indicated that they could provide him with nice facilities which would become his property eventually. He rejected all these offers, stating that he was working for the Bureau of Ordnance and was determined to remain loyal to that organization.

During this general period, the contract was amended from time to time as the Navy made more funds available for the project. These were routine matters, involving no negotiations, and were normally arranged in a brief telephone call. This was in accordance with the terms of the contract, which permitted the gradual addition of funds by the Navy, via successive amendments. This is called in the Navy an "installment type contract".

In the early months of 1952 the question of a loan was revived in the Navy, and blocked again, this time on the excuse that The Jacobs Instrument Company was a small firm and did not have a large amount of collateral to offer. (For comments on the validity of this objection, see p. 908 of the Transcript).

Navy pressure on the defendant to merge with a large company in order to expand his facilities continued to mount, and finally the defendant agreed to listen to p[illegible] this line.

[illegible] the defendant visited Admiral M. F. Schoeffel, Chief of BuOrd, and discusse[illegible] e situation with him. The Admiral was pleasant but noncommittal. He did state that BuOrd was receiving little return from most companies for the money BuOrd was spending with them for weapons research, but that The Jacobs Instrument Company was the "one bright spot in the picture". On the question of the blocked loan, he stated he would look into the matter. However, four days later he took action to again block the loan when ReSd tried to get it moving again. The defendant then again brought up the question of having some local investor build a suitable laboratory, and pointed out that if the Navy would guarantee a five year lease, this could be accomplished. The Navy again showed no interest in this proposal.

SECTION III -- FACTS

On 17 May 1952 Admiral Schoeffel wrote to Mr. Jacobs telling him that he could not recommend the proposed loan (Def. Ex. 9) and saying: "I regret to say that a way cannot be found to support a government loan to you for construction of a laboratory building. If the high quality of your work and potential value to national defense of your product were major factors in the decision, I am sure the loan could be granted. Unfortunately, the factors which are of primary considerations on a loan application in government, as in business, are the cold, hard facts of dollar risk." It is to be borne in mind that the Korean War was being intensely fought at this time; that the Navy had no responsibility or authority for making financial judgments on Defense Production Act loans; and that there was a desperate battlefield need for usable bombing equipment.

On 3 June 1952 LCDR A. Henry (CDR Hinman's assistant) of BuOrd telephoned to the defendant and said that he was in touch with a retired Admiral, D. S. Fahrney, who represented the White-Rodgers Electric Co. of St. Louis. Henry said that White-Rodgers wanted to acquire The Jacobs Instrument Company, and he wanted to set up a meeting to discuss this possibility. Two days later (5 June) LCDR Henry and ADM. Fahrney visited the defendant to discuss this possibility, and on 11 June other officials of White-Rodgers visited Jacobs. On 14-16 June 1952 Jacobs went to St. Louis to discuss the terms of the proposed merger. He learned, to his horror, that he was expected to turn over all physical assets, technical data, patent rights, and all other company property to White-Rodgers, and in return was to receive a low-salaried job. He indignantly rejected this "offer" and returned to Bethesda. White-Rodgers contacted him several more times after this and repeated this "offer", but it was always rejected.

To review a bit, from the very beginning of the defendant's contacts with BuOrd down to the middle of 1951, Section Re8d in BuOrd had been professionally staffed. Its head (LCDR Puryear) had been an officer with a college degree in physics and many years of experience as a Naval officer in the field of aircraft fire control. His advisors were several engineers and a physicist, all with professional training and lengthy experience in fire control, which is a highly specialized field. The first change in this set-up had occurred in the summer of 1951, when LCDR Puryear had been replaced by CDR Hinman, a professional Annapolis-graduate Naval officer with only a nominal amount of fire control background. However, he still had a professional staff to advise him. If the Navy's fire control program did not make, under Hinman's direction, the aggressive forward strides it took under Puryear, at least it made no retrogression. Now, in mid-1952, another major and vital change was made. All personnel connected with the Mark 6 work were removed from the bombing fire control section, and a new group took over. It is worth while to look over this group. The new section head was CDR W. E. Lemos, another Annapolis-graduate professional Naval officer with a negligible knowledge of fire control. His second-in-command was LT(jg) T. R. Kent, a man who had worked his way up through the ranks. He had specialized in operating ships' engines while an enlisted man. He was in all respects an officer and a gentleman, being soberly honest and conscientious, but his knowledge of fire control was negligible. The Mark 6 work had one civilian "engineer", a man who had had 13 years of experience as a printer in the Bureau of Printing and Engraving, and 1 year's experience in the procurement of electronic equipment in the Bureau of Ships before being transferred, in July 1952, into Re8d as its fire control "engineer". As of that time he did not have a college degree of any sort. This man, whose name is Edwin P. Schweitz, was, to use his own words (Transcript, p. 10), "responsible for reviewing the technical aspects of the contract, in advising the head of the section on the technical work of the contract." Review this description of Schweitz's duties, with his background as outlined above (it can be found in the Transcript, p. 9, 10) and you will get some rough idea of how the dice were loaded at this point. Place in charge of the section a professional promotion-hungry officer, willing to carry out any orders or hints received from above, and give him as assistants a very junior man who had come up through the ranks and wasn't going to argue with an Annapolis superior, and give him as a civilian "expert" a man with no background in fire control but a great desire to get on in the world, and with this type of carefully selected team any desired sort of results could be accomplished. Schweitz was the key Government witness during the trial, and he had even been promoted to a position as head of Re8d just before the trial, in order to give him some prestige that his background would not afford, and of course he was removed again shortly after the trial (probably to his own surprise). The head of the whole Aviation Ordnance Branch (Re8) at this time, and on to the termination of the Mark 6 work, was Captain J. M. Elliott, another professional Naval officer. The de facto

chain of command was from ADM Schoeffel (Chief of BuOrd) to Capt. Elliott (Head of Re8) to CDR Lemos (Head of Re8d). We shall see the workings of the Schoeffel-Elliott-Lemos team.

The first knowledge the defendant had of this new team was when he was visited by CDR Lemos for the first time on 2 July 1952. The situation of The Jacobs Instrument Company at this time is well set forth in a letter (Appendix 7) from Admiral P. B. Nibecker (Vice Chief of Naval Material) to the Defense Production Administration, with copies going to the Army, Air Force, and Munitions Board. This letter is in the category of new evidence, having come into the defendant's possession after the trial, in a manner to be related subsequently. It says, in part, "The research and development work accomplished by the Jacobs Instrument Company in the field of aviation fire control and in subsidiary developments which the Department of the Navy is desirous of undertaking. The present capacity of the company is about 10% of the total capacity which would be needed if contemplated development programs are to be undertaken by this firm. Current Navy expenditures to the applicant are at a rate of approximately $200,000 per annum. It is expected to provide approximately $500,000 in the 1953 budget for continuing the research work by this company. In addition, as soon as the firm has sufficient facilities, it is proposed to let another contract for accomplishing development work on transistors, in the amount of approximately $100,000 per year. Possibilities of still further contracts exist.

"The Jacobs Instrument Company is well ahead in development of real-time digital computing and this accomplishment dictates exploitation of their proven abilities. Technical accomplishments to date of this company on the current Navy contract have been outstanding. Due to the limited space available, the speed with which this company can complete the current contract is barely acceptable in the light of present day needs. This company has made several by-product developments which can be well used by operative forces today. The program planning for the Jacobs Instrument Company by the Navy is to be of long duration and undoubtedly will require considerable research and development over a period of the next five years before quantity production can be feasible. Considered in the light of technical advances made by this company during the past two years, little doubt is held that the firm will be a valuable research and development concern for a number of years."

The letter concludes with a refusal to endorse the company's loan application because of insufficient collateral.

This letter (whose contents were of course not known to the defendant at the time) shows what a ripe plum for plucking by greedy hands was The Jacobs Instrument Company, and the hands were not long in appearing. Eighteen days after that letter was written, and nineteen days after the appearance of the new group in Re8d, the defendant received a telephone call from a Mr. Inn, the president of a subsidiary of the General Precision Equipment Company (a holding company). He stated that ADM Schoeffel (Chief of BuOrd) had recommended that General Precision Equipment should acquire The Jacobs Instrument Company. Mr. Inn quoted Admiral Schoeffel as saying he expected the two companies to get together on this. Later that same day, CDR Lemos (the new head of Re8d) called the defendant and asked whether he had been contacted by Mr. Inn. When assured that this had occurred, Lemos expressed satisfaction and said he hoped an arrangement would be worked out.

During this period, the defendant had come to the conclusion that if he was going to be forced to sell his company (and that was the direction of Navy pressure at this time), he might try to select a buyer himself. He approached several prospective buyers, one of whom was the Radio Corporation of America (RCA). Two days after the foregoing conversation, i. e. on 23 July 1952, two representatives of RCA visited the defendant. A possible sale to RCA was discussed, and the RCA representatives appeared much interested in the possibility. Because the Navy would have to approve any possible sale, the defendant called CDR Lemos to arrange for the RCA men to speak to him. Lemos agreed to speak to these men, but stated that he "hoped earnestly" that the defendant would turn his company over to General Precision. It is particularly to be noted that while various possible sales of The Jacobs Instrument Company to various potential buyers were mentioned over a long period of time, the Schoeffel-Elliott-Lemos group <u>invariably</u> exerted pressure to discourage any sale to any buyer except General Precision, and, as we shall see, that sale was to be on giveaway terms. Several firms with fine facilities made acceptable offers to the defendant, but these mergers were always blocked by the Schoeffel-Elliott-Lemos group, and in some cases the firms were threatened with loss of government business if they did not discontinue their interest

in the Mark 6 program and the defendant's company.

It is very interesting to note (see deposition of ADM Schoeffel) that immediately after ADM Schoeffel retired from the Navy early in 1955, he became employed by the General Precision Equipment Company, a holding company which doesn't do anything but own other companies, as its "Director of Weapons Planning". He performs this function working at his own home in Alexandria, Va. The company's offices are in New York City.

To return to the matter of RCA, after its two representatives visited CDR Lemos, that corporation advised the defendant that on the basis of information received from him and from the Navy they could not proceed with the matter. On 5 August 1952 CDR Lemos visited the defendant and attempted to persuade him that he must turn his company over to General Precision without compensation. Several days later, on 8, 11, and 14 August 1952 representatives of General Precision visited the defendant to discuss the possible acquisition of his company. The offered the defendant nothing but the depreciated value of his physical assets plus an advance on some very vague prospective royalties. The defendant refused this offer. The General Precision representatives said that for tax reasons they could offer nothing tangible in the way of payment for technical data, know-how, or patent rights, but they could purchase physical property. It was suggested that if some of the work-in-process (certain items developed by defendant's company under Contract NOrd-10531, whose ownership was not clearly defined) could be declared the property of the defendant's company, their acquisition by General Precision could form the basis for a reasonable purchase. It was agreed that this sounded like a sensible program, provided that the Navy would agree on the question of the ownership of the work-in-process items. Accordingly a meeting to discuss this subject was held on 15 August 1953 at the Bureau of Ordnance. It was attended by a large number of Navy representatives, as well as General Precision and Jacobs representatives. The question of the ownership of the work-in-process items (all of which are involved in the present suit) was first discussed, and the Navy representatives appeared to be very favorably disposed to considering these defendant's property for the purpose of a sale of defendant's company to General Precision. However, while this matter was being discussed it was revealed (greatly to defendant's surprise) that an agreement had been reached between CDR Lemos and the General Precision representatives that the Navy would reimburse General Precision for the purchase of defendant's company. This shocked the legal representatives of BuOrd, and they indicated that this would not be acceptable to them. The question of whether the defendant personally would remain with his company if this type of sale took place was raised. The defendant stated he would not. Several of the Navy representatives (not CDR Lemos) then said that they would not approve of any sale which would not involve the defendant going along personally with the project because of his specialized knowledge of the Mark 6 and related fire control projects. The meeting then broke up.

Later than day CDR Lemos visited the defendant's plant and violently upbraided the defendant for saying he would not become an employee of the firm that acquired his company. He also stated that when General Precision found out that it would have to pay any purchase price out of its own funds and not out of Navy funds, it lost interest in the matter, and that he was informing the defendant that they were withdrawing their "offer". He stated that the Bureau of Ordnance would terminate the defendant's contract if he did not prove more amenable to BuOrd suggestions on these matters.

During this same period (August 1952), the question of the loan application came up again. The Defense Production Administration, which had the legal authority and responsibility for determining the financial soundness of loans, had had field agents investigating the defendant's managerial ability, credit ratings, etc. and had come to the conclusion that a loan to him, in the amount requested, was a sound risk. However, the Navy's letter of 3 July 1952 (Def. App. 7) had blocked the loan, while stating that a defense need existed for it. DPA felt (a) a real military need existed for the loan, and (b) that the loan was sound financially, and (c) that with a shooting war going on, it was a very serious matter to hold up such a loan. In a conversation with the defendant on 11 August 1952, a DPA official made these opinions known and suggested that the defendant try to get the Navy to stop blocking the loan on financial grounds, and just certify as to the military need for it. DPA was willing to take the responsibility for its own decision on the financial aspects. That same day the defendant wrote the letter to the Navy which is reproduced in Def. App. 8 (Def. Ex. 14).

On 19 August 1952 Capt. J. M. Elliott, the head of Re8, visited defendant's company to review work progress. He expressed himself as being very pleased with it, and said that the funds available to The Jacobs Instrument Company were being increased from approximately $150,000 per annum to $600,000 per annum. He reported to his superiors, in a memorandum dated 27 August 1952 (new evidence discovered after trial), in part, as follows: "2. The technical excellence of the work being conducted and the progress being made are entirely satisfactory to this branch. Mr. Jacobs has many interesting ideas for additional uses of the computer in solving other problems involved in flight of modern a/c (Ed.note: aircraft) which appear to be worthy of further investigation. Actual progress, since the last visit of "A" (Ed. note: Admiral Schoeffel) to the plant, has been substantial. ****** Jacobs is doing outstanding technical development work in the field of aviation fire control. Expansion of BuOrd work beyond the $600,000 annual estimate is not present foreseen although, if an adequate facility were available there might be later extensions. Other government agencies have indicated interest in having Jacobs undertake development work for them. This has not been possible due to limited facilities. This is an indication that substantial financial support would be forthcoming from agencies outside of BuOrd, if adequate facilities were available." The entire memo is reproduced as Appendix 9.

Two things are to be noted from this memo. One is what a juicy piece of loot The Jacobs Instrument Company was at this time. The other is Elliott's statement that "the progress being made (is) entirely satisfactory to this branch". This is most interesting when taken in context with the violent pressure being exerted on the defendant at this time by CDR Lemos to turn his company over to General Precision (for basically no consideration) in order to get better facilities so the work would be [illegible]. The fact that Lemos was telling the defendant a falsehood in order to try to force him to give away his company is revealed clearly by Elliott's memo. The defendant did not know of this state of affairs at the time of the trial, as is revealed by his testimony on p. 938 of the Transcript.

On 3 September 1952 the defendant pointed out to CDR Lemos that he wasn't going to give his company away, and that it was working just as fast as was humanly possible, and that he wanted to know whether this work rate was acceptable -- he was doing everything he could and could do no more. CDR Lemos then said that the work rate was not acceptable. However, on 5 September, in a telephone conversation, Lemos said that the work rate would be acceptable, and he also promised to get the defendant's salary increased to $40,000 per annum from $16,000 per annum. On 11 September, in a conference at BuOrd, CDR Lemos told Mr. Jacobs that the Navy wanted to raise the spending rate on the project (about $150,000 per annum) by at least another $450,000 per annum, and preferably more. This again raised the question of expanded facilities for an expanded program. On the next day, at another meeting in BuOrd CDR Lemos agreed to drop the demand for expanded spending because there was no immediate solution in sight for the facilities expansion problem. At this meeting Lemos reiterated his satisfaction with the existing rate of progress. At this time Lemos divested himself of responsibility as project officer, and turned this responsibility over to LT(jg) T. R. Kent. Kent was to have administrative responsibility over the Mark 6 work henceforth, and was to receive technical advice from the civilian engineer, Edwin P. Schweitz. On 19 September the defendant advised CDR Lemos that he had available a private investor who was willing to construct an expanded laboratory for the defendant if the Navy would guarantee the lease. As before, the Navy was uninterested in this proposal. It again appeared that the Navy was interested in frustrating any practical solution of the expansion problem (private investor or Government loan), and was only interested in attempting to force the defendant to give his company to General Precision.

On 23 September 1952 a conference was held in BuOrd to discuss the loan application again. Many Navy representatives and the defendant participated in it. The defendant was told that expansion of his facilities was necessary, and that the Navy would expedite the loan application. Capt. Elliott stated that a decision had been made to expand the Jacobs annual spending rate over the $600,000 figure which had been previously mentioned. With reference to the work being then performed by The Jacobs Instrument Company, Admiral Schoeffel stated in an internal Navy memo to the Chief of Naval Material (newly discovered evidence) dated 4 October 1952, "(a) The Jacobs Instrument Company has been and is now performing outstanding developmental work under its present contract (NOrd-10531) and BuOrd considers this company to be a leader in the field of airborne application of digital computing techniques. BuOrd emphasized the fact that it definitely desires to have this firm continue its present work and future

work in this particular field. (b) There is an increasing demand for the above type of work and although BuOrd cannot guarantee that additional contracts will be awarded to the Jacobs Instrument Company in the future, it is anticipated that BuOrd will continue work of the nature heretofore performed with this firm in an approximate amount of $600,000 per year provided the need exists, necessary facilities and funds are available". The entire memo can be found in Def. App. 10. In the matter of the loan application (on which this memo was intended to be a vigorous endorsement) the memo states, "Some expansion of the Jacobs Instrument Company's facilities is considered by BuOrd to be desired. The extent of this expansion is a matter which it is believed should be determined by the lending agency since the loan application presented by Mr. Donald H. Jacobs may be based upon work other than that to be performed for the Bureau of Ordnance." So weak an endorsement would obviously have no useful effect (the Office of Naval Material stated a very strong endorsement was required), and the loan died again for lack of support from ADM Schoeffel. This occured at the end of October 1952, at which time Admiral Schoeffel tried to blame it on RFC, telling the defendant that RFC (which then had some connection with such loans) had turned it down. The RFC official in charge of the loan told the defendant, however, that the loan had never been endorsed by the Navy, and Admiral Watt, Ass't. Chief of Naval Material so advised the defendant by letter (see Def. App. 11 and Def. Ex. 16).

On 14 October 1952 the defendant was visited by Lt. Kent and Mr. Schweitz, and a time schedule for the Mark 6 work was discussed. The defendant promised that the final computer, JAINCOMP-C, would be ready in August 1953, and that the JAINCO system would be in field test and pretty thoroughly tested by then. This time schedule was found acceptable by the BuOrd representatives, and was adhered to by The Jacobs Instrument Company. It was not later changed by either party. This fact is particularly significant in view of BuOrd's later claims that the Mark 6 work was stopped because it was not on an acceptable time schedule.

In November 1952 the defendant engaged, as a contract consultant and advisor, Mr. H. Tayloe, of Tayloe and Associates. Mr. Tayloe had been the chief negotiator in the Contract Division of BuOrd, and had a really broad understanding of the legal aspects of the highly specialized field of government contracting and contract terms.

On 25 November 1952 the defendant was invited to visit BuOrd for a conference with CDR Lemos. However, Lemos did not show up, having gone off for the day with Admiral Schoeffel. Lt. Kent and Mr. Schweitz did speak to Mr. Jacobs, however, telling him that BuOrd was no longer interested in the Mark 6 program, and wanted to terminate that and shift the efforts of The Jacobs Instrument Company to the JAINTAC tactical bombing system. The defendant again vigorously resisted this ill-advised effort to cut off the Mark 6 work, maintaining that the Mark 6 would have important battlefield uses, and pointing out that the JAINTAC system would come into existence faster if the Mark 6 work were permitted to go to completion, for it would bring to completion various techniques needed in JAINTAC. The BuOrd representatives finally agreed to adopt the defendant's point of view. It is pointed out that the Mark 6 program remained in existence solely through the defendant's insisting on its importance. Approximately one month after this last BuOrd attempt to kill the Mark 6 program had been argued down by the defendant, an urgent battlefield requirement for the Mark 6 arose in Korea. We shall see how the defendant's subsequent attempts to maintain the integrity of the Mark 6 program turned out.

In December 1953 Lt. Kent and Mr. Schweitz requested the defendant to revive a faulty bombing system called the "Green Dragon" by designing a JAINCOMP-type computer for it. The defendant spent several months looking into the ailments of the "Green Dragon" and concluded, after considerable study, that the deficiencies in that system were rather widespread, and extended to other components than the computer. He offered to redesign the system so it would work, but pointed out that a plant facility problem would arise again, if he were to undertake that project concurrently with the Mark 6 work. This matter was discussed at some length, in a number of conferences, by the defendant with the Bureau of Ordnance, the Bureau of Aeronautics, and the Marine Corps, all of whom were interested in the "Green Dragon".

At the beginning of 1953, a major change took place in the Navy's concept of the Mark 6 program. To understand it, we will review a bit. It will be recalled that the Navy's enthusiasm for the Mark 6 system per se, had fluctuated widely. As late as the end of November 1952 BuOrd had proposed to drop the Mark 6 program entirely in favor of the development of JAINTAC. It was only the defendant's continued insis-

tence on the importance of the Mark 6, and his refusal to be drawn off along pleasant-looking bypaths, that kept the program alive. There had been tremendous pressure on the defendant to dispose of his company to General Precision Equipment Co. However, all the pressure on the defendant was mild compared with what was to come, for if any company got the Mark 6 program as it existed up to this point, they would have gotten only a good research and development program plus important know-how. A research program consists mostly of headaches, and is unremunerative in the extreme, so the specific prize had been all the important know-how of the defendant's company, but there would have been no immediate big financial reward to whomever acquired the defendant's organization.

In January 1953 the Chief of Naval Operations (known as CNO) issued a directive to BuOrd which indicated that an urgent battlefield requirement existed for the Mark 6 system. BuOrd has admitted that such a directive exists, but says it is "lost" and hence it does not appear as evidence. The project officer, Lt. Kent, has stated on deposition that when this directive was received by BuOrd, the Mark 6 system was the only system known to BuOrd that could fill the requirements, and that The Jacobs Instrument Company was considered to be the only company qualified to carry the development through to a conclusion.

The CNO directive had one very important, in fact fatally important, implication: there would be massive procurement in the Mark 6 program. This meant there would be heavy spending in the Mark 6 program, and this means appreciable potential profits.

One of the most interesting aspects of the CNO directive is that its existence was kept secret from the defendant, and he did not, in fact, learn of its existence until the deposition of Lt. Kent was taken in the spring of 1955. If BuOrd considered that the issuance of the directive placed greatly added importance on the Mark 6 project, it is most amazing that the fact was not transmitted to the man who had the sole responsibility for carrying out the program. And this was in the midst of a shooting war. Let us see what happened after this directive was issued.

When the Mark 6 work had started, the defendant was faced with the task of building up a skillful staff (and he had to train all employees in the science of fire control engineering, as none had experience in that field), and he had to do this in a most unsuitable plant. This had not been easy, but it had finally been accomplished, and for the last year of the contract there was virtually no turnover, and the company was running like a well-oiled machine. The defendant feels that it took some managerial as well as technical skill to keep this operation moving vigorously and effectively under the rain of sledge-hammer blows he was receiving from the Bureau of Ordnance.

On 19 January 1953 the defendant was visited by Lt. Kent and Mr. Schweitz, who told him that further troubles were being experienced with the faulty Norden bombing system and the "Green Dragon", and that they wanted the Mark 6 program expedited. The defendant again wearily reiterated that with expanded facilities more work could be taken on, and the Mark 6 could be expedited, but not otherwise. At this meeting the so-called "interim program" was first brought up by the BuOrd representatives. This was to become an important issue, and it had best be looked at closely. It will be recalled that the Jacobs organization was building the JAINCOMP-C digital computer for use in the Mark 6 system. This was the most vital part of the system. It had been found that the various instruments that feed information into the computer (input instruments) had to be very accurate, for a good computer will give the wrong answer if fed inaccurate information at its inputs. So, The Jacobs Instrument Company had been perforce faced with the necessity of developing its own input instruments, for existing instruments simply did not meet the accuracy requirements of the Mark 6 system. The "interim program" proposed by Lt. Kent and Mr. Schweitz was to substitute two relatively inaccurate input instruments (one manufactured by Norden, and one by General Precision) for the ones under design by the defendant. These would clearly lead to great degradation in the performance of the Mark 6 system. Furthermore, because the two newly proposed instruments were basically analog in design, and intended for use with conventional analog systems, they would not fit into the digital Mark 6 system without the development of conversion equipment which would adapt these analog instruments for use in a digital system. This would stretch the development time for the interim system to a value greater than the development time for the original Mark 6 system. Hence the proposed interim program made very little sense indeed to the defendant, for it appeared to stretch the development time out, and vastly decrease the accuracy of the Mark 6 system, without any perceptible gain. It made a good deal of

sense to the people in BuOrd who so favorably regarded Norden and General Precision, for if there were to be appreciable production of the Mark 6 system, Norden and General Precision would receive a portion of it. True, this would be done at the sacrifice of the accuracy of the Mark 6 system, but, as we shall see, this bothered no one in authority.

Let us, for a moment, examine the chilling implications of this interim program. In this country we have come to take impropriety in military procurement practically for granted, and our military history, from the Revolution through the Korean War, is loaded with repeated tales of faulty military shoes, sanded gunpowder, "Flying Coffin" airplanes, defective shells and fuzes, and so on ad nauseam. The general attitude appears to be, "Well, a certain number of people will always be found to have sticky fingers, and while it is regrettable, the nation has always survived these things, and, anyway, people who oppose these things always come to unpleasant ends." A certain amount of this philosophy appears to have entered the thinking of the District Court Judge, who said in an opinion (Transcript, p. 1136, and Def. App. 3), "We have a system here which has been built up over many years, and no one would claim that its principal purpose or virtue is efficiency. In this country, we have come almost to distrust efficiency in government. We have seen in other countries where the government got too efficient in some of its work, and it was terrible for people who had to live under it. One of the prices we have to pay for our freed[illegible] is a certain amount of inefficiency in the government." Now it is all right, possibly, to shrug one's shoulders over defective military shoes or the like, and to murmur, "Well, the nation will live through it", but we have entered a new era -- an era of new weapons of tremendously superior efficiency and destructiveness, and the nation which falls behind in the race for superior weapons is the nation which will not survive. So we are no longer talking of whether or not a soldier gets sore feet through being issued faulty shoes -- we are talking about whether or not we will win or lose extremely destructive wars. This is what is involved in the question of effective, honest weapons development. Even in the days of World War II, when the first crude suggestions of modern weapons began to appear, this fact was demonstrated most clearly. As General Eisenhower has pointed out, if the Germans had developed the V-2 guided missile a few months earlier, the Normandy invasion would have been impossible as it would not have been practical to concentrate great masses of troops at Britain's channel ports. And as one of the key figures in the development of the V-2, Walter Dornberger, has pointed out in his book "V-2", the development of this weapon was set back by a long period of time when a cabal of big-business interests descended on the smoothly-running V-2 development program and pulled it apart in their attempts to get control of it. And you must remember that even with a guided missile, when you consider whether or not the weapon is to be developed successfully, you are considering whether or not you will kill large numbers of your enemies. But in a bombsight program, you have an additional and most vital factor to consider: whether or not you will kill large numbers of your own troops. When front-line troops are in close contact with the enemy, as is common in modern war, bombing of positions near the lines of combat often results in dumping bombs on friendly troops when inaccurate bombsights are used. This happened often in World War II. Also, when the bombing of a small, vital target is difficult because of inaccurate bombsights, the target can only be destroyed by mass bombings involving many planes on many missions. This always results in the loss of a number of friendly planes and crews as the inevitable combat percentage takes its toll. These men, too, are victims of faulty bombing equipment.

So, we can inevitably conclude that a bombsight development program is the sort of thing over which one does not shrug one's shoulders and mutter "Oh, boys will be boys" when its integrity is threatened. It means life or death for Americans (and the defendant has seen a number of very important examples of this, outside the confines of this case), and it must be judged as a matter of the utmost gravity.

The defendant was and is the President and Technical Director of The Jacobs Instrument Company. As its President he handles its business affairs, and he knows that compromise is the very essence of the American way of doing business, and governs his business activities accordingly. But when acting as Technical Director, he has to adopt another point of view. You can compromise with another man, but you can't compromise with the laws of nature. With regard to the defendant's position on the interim program, the District Court stated (Transcript, p. 1137, and Def. App. 3),

"On the other hand, Mr. Jacobs, I think, was reaching for the moon. It is almost impossible to combine the scientific perfectionism for which we all respect him with the operation of business or governmental or bureaucratic operations in any form of

business or government about which I have ever known or read. A certain amount of give and take has to be present." It is the defendant's position that the Judge's opinion is wrong; it is the opinion of the past. Give-and-take on business matters is practical and necessary. Give-and-take on weapons development means nothing short of national disaster. The District Court said further (Transcript, p. 1138 and Def. Appendix 3), " *** but I think you are reaching for the moon when you expect to be able to do that, to operate in the scientific way that he wants to operate and at the same time try to go into production of an item in some of the ways that were discussed in the course of this operation and some of the proposals that were made." The defendant feels sure that the Court did not understand that the interim program means, inevitably, dumping American bombs on Americans, else it would not have contemptuously dismissed the defendant's position as "reaching for the moon". Similarly the defendant assumes that those people in the Navy, who pushed the interim program so vigorously to do their big-business friends a very big favor, never realized that they were advocating a sacrifice of American lives. This illustrates, however, the results of putting the administrative responsibility for weapons development in the hands of people without sound technical backgrounds -- a practice which has arisen only since the last war.

To return to the chronological narrative, the interim program was first proposed by Lt. Kent and Mr. Schweitz at a conference with the defendant on 19 January 1953. The implications of this interim program (which was the substitution of the Norden and General Precision input instruments for the concededly more accurate input instruments under design by the defendant) were immediately evident to the defendant, but he wanted to discuss the proposal with his technical staff to get their reactions to it before giving his comments on it to the Navy. Following this conference he spent over a week discussing this matter with his staff and performing an analysis to determine the effect on the accuracy of the Mark 6 system of the proposed substitution of input instruments. The defendant's original reaction, his subsequent reaction after this analysis, and the unanimous opinion of his staff were identical: the proposed interim program would degrade the Mark 6 system to the point where it would be very bad indeed. Specifically, an eight-fold decrease in accuracy would be expected from the interim program. On 28 January 1953 these results were discussed with Mr. Schweitz. The defendant pointed out specifically that the interim program would lead to a great decrease in bombing accuracy, and pointed out that the original objective of the Mark 6 program had been to achieve a bombing system of vastly superior accuracy. He told Schweitz that he assumed that this was still the objective of the program, and stated that if some change in objective had been decided upon in the Navy, he would like to know about it, for the interim program and the original objective of the Mark 6 program were clearly incompatible. (Remember, the defendant did not know of the existence of the CNO directive.) Schweitz said he would discuss this with CDR Lemos when he returned from a visit to the Norden plant. The interim program was not mentioned again for some time.

On 6 February 1953 Lt. Kent and Mr. Schweitz visited the defendant and said that the Bureau of Ordnance wanted to put an additional $700,000 into Contract NOrd-10531 to be utilized up to October 1954 (Transcript, p. 959). On 17 February Lt. Kent said that BuOrd had available $550,000 for the Mark 6 project to carry it to October 1954, and he asked Mr. Jacobs to write a letter to the Bureau requesting this amount plus a fixed fee (Transcript, p. 961-3). It was also suggested that Mr. Jacobs put in his letter requests for various administrative changes he and the Navy desired in his contract. The defendant agreed. Lt. Kent's verbal request was supplemented by a formal request, in the form of a letter dated 19 February 1953 (Gov. Ex. 6), couched in somewhat different terms. The defendant replied on 4 March 1953 (Gov. Ex. 7), requesting the exact amount specified by Lt. Kent. He also suggested a salary change in an amount previously agreed upon with CDR Lemos, and other administrative changes. During the trial of this case the Government made much of this letter, and strongly implied (Transcript, p. 18 forward) that the defendant was trying to force an unreasonable and exorbitantly high spending rate on the Government. It was only on cross-examination that this deception was cleared up. Of course, Lt. Kent's deposition, too, reveals the true state of affairs (See Transcript, p. 961-3). The Government also tried to inflate the suggestions for salary and other administrative changes in this letter (all of which were <u>suggestions</u> only, and all of which had previously been discussed with and agreed upon with Navy representatives) into harsh and unreasonable demands, although it claimed (incorrectly) that these changes were "demanded" many months later, just before the contract was terminated. It is particularly to be noted that the salary change suggested in this letter of 4 March 1953 was given as a reason for termination at the end of June, al-

though the figure mentioned in the 4 March letter was not mentioned again prior to termination.

On 2 March 1953 Lt. Kent advised the defendant that he was trying to reopen the question of a loan for The Jacobs Instrument Company, and on 12 March he said he was working vigorously for this loan, as he felt this loan to be necessary for the defendant to take on the wide range of work the Navy wanted the company to handle. The very next time the defendant saw Lt. Kent was on 2 April 1953, at which time he and Mr. Schweitz told the defendant, without any preamble, that BuOrd was going to terminate Contract NOrd-10531 because of a "lack of availability of funds". No explanation of this was given to the defendant, and his visitors left without further discussion. The defendant was, naturally, completely stunned, and it wasn't until Lt. Kent's deposition was taken in April of 1955 that he found out what had caused this radical change. The pertinent excerpts can be found on pages [illegible] 4-979 of the Transcript.

In brief, what had happened was this: After the issuance of the CNO directive the interim program had been proposed to Mr. Jacobs. He had reacted adversely because of its effect on the accuracy of the Mark 6 system. (It is to be recalled that the Mark 6 system only remained in development because the defendant had taken a strong stand on the matter and had rejected various ill-conceived attempts to modify the program. So he saw no reason to fear any dreadful results from again making his views known to the Navy. What he didn't know this time was the existence of the CNO directive, which meant big spending and hence big-business influence in the Mark 6 program, and hence the suggestion of the interim program.) When Mr. Jacobs recommended against the interim program on 28 February, the die was cast. Seeing that the defendant was not going to accede to a plan which would bring Norden and General Precision into the Mark 6 program, BuOrd took steps to force the defendant out of the program immediately. These steps were, first, to drain away the funds that were in BuOrd's budget for the Mark 6 program. In March 1953 CDR Lenos ordered Lt. Kent (who was the Budget Officer of Section Re61) to divert the funds that had been budgeted for the Mark 6 work, to unrelated projects of Norden and General Precision. This was done, according to Lt. Kent's deposition, with a full knowledge that The Jacobs Instrument Company was the only organization qualified to carry this work through to completion (see Transcript, p. 942). It was done in wartime, and it completely torpedoed the Mark 6 work. The Norden and General Precision projects to which the Mark 6 funds were diverted were unrelated to the Mark 6 work, and hence could do nothing to meet the battlefield requirement expressed in the CNO directive. CDR Lenos's act had made impossible the continuance of the one project that could meet the requirement, for when money is removed from a project's budget, the project inevitably dies. It was known in the Bureau of Ordnance that sufficient Mark 6 funds had been allocated to the defendant's organization to carry it up through June 1953, and the defendant had several times pointed out, verbally and in writing, that a crisis was bound to occur when the funds ran out. He had urged the Bureau to put in more funds, on the installment basis, as it had done in the past. This could be accomplished, as previously, without negotiation simply by sending a contract amendment out in the mail.

Apparently BuOrd next decided not to terminate at this point, for the stoppage of the work could be easily traced to the diversion of the Mark 6 funds, and this might look a little funny in the face of the CNO directive. A decision was made to shift the Mark 6 project to the Naval Ordnance Plant, Indianapolis (NOPI), an organization under BuOrd management control, which could be ordered to employ the interim program and subcontract other parts of the Mark 6 system to Norden and General Precision, and it was decided to try to force the defendant to quit the program voluntarily.

On 7 April 1953 Lt. Kent called the defendant and requested permission for representatives to visit the defendant's plant from NOPI. These people had visited the defendant's plant before, and permission was given for this visit. Lt. Kent stated that he had not said, on 2 April, that termination of the defendant's contract had been decided upon, but admitted it was under consideration. Apparently BuOrd was not going to proceed with the termination until they first had a try at getting possession of the defendant's technical data and finding some safe way of pushing him out of the program. It was also arranged that Mr. Tayloe, the defendant's contract advisor, would visit BuOrd to find out what the termination talk was about. Mr. Tayloe made this visit on the next day, 8 April, and talked with CDR Lenos and Lt. Kent. CDR Lenos made a furious verbal attack on the defendant, charging that he should have expanded his facilities in accordance with Navy wishes but had not done so; that he wanted to terminate the program; that he could have hired more employees even if he didn't have any place to put them; etc. Mr. Tayloe, a quiet, calm indivi-

dual, was nearly startled out of his wits by this attack. He was even more startled when CDR Lemos warned him that he had better stop representing the defendant or he would find himself on a Navy blacklist. Mr. Taylor reported all this to the defendant with considerable indignation; however some weeks later (after another discussion with CDR Lemos) he disappeared from the defendant's employment without notice or explanation or submission of a final bill. This was the first time this sort of thing happened, but it was by no means the last. This verbal assault on the defendant was the first crude attempt to insult him into withdrawing from the program.

Upon receiving the above report from Mr. Taylor, the defendant was quite bewildered. He didn't know what was going on. (He didn't know of the CNO directive; he didn't know the funds had been drained out of the Mark 6 budget.) Accordingly he called CDR Hinman, who had at one time been head of Re8d and the project officer for the Mark 6 work, and who was now the assistant to Capt. Elliott. The defendant explained to CDR Hinman the weird series of events that were taking place and asked him to find out what was going on. Hinman said none of this made sense to him and that he would look into it. The following day (9 April) the defendant had another telephone conversation with CDR Hinman, who indicated that CDR Lemos and Capt. Elliott were saying that the defendant had no interest in continuing the Mark 6 project and wanted to terminate his contract. The defendant pointed out indignantly that these stories were completely false; that he was doing everything in his power to continue the work and had turned down much more lucrative contracts that had been offered him in order to continue with the Mark 6 work. Hinman and the defendant were both bewildered by this exchange of views, and CDR Hinman suggested that a meeting be held at BuOrd to discuss this matter fully. The defendant agreed, and a meeting was held at the Bureau of Ordnance on 14 April 1953.

This meeting is described in a Navy memorandum, prepared by CDR Hinman, which is Defendant's Exhibit 18, and is to be found in Def. Appendix 12. The memo states, in part, "Cdr. Lemos stated that he considered the work progress now unsatisfactory and felt that NOPI could complete the Bomb Director more rapidly. This was the entire basis for the termination consideration." At this meeting CDR Lemos complained that he had not been able to get a firm time schedule for the completion of the Mark 6. The defendant had had his staff working for several weeks on the preparation of a firm time schedule, and he showed to CDR Lemos a series of bar charts showing the time schedule of the program, right up to completion, in diagrammatic form. These charts showed that the Mark 6 would be in a flyable status by the end of August 1954. (Although the defendant did not know of the existence of the CNO directive at this time, this time schedule was well within the schedule required by the directive.) The following excerpt from Hinman's memo is particularly to be noted; "He asked Jacobs when it will be possible to get the Mk6 in an aircraft. Jacobs answered that his estimate was the summer of 1954 using a Mk 26 gyro. Mr. Jacobs said this completion date was based on continuing on his present status." This last sentence proves that the Navy knew that this time schedule was based on the defendant's present status, i. e. his then-existing plant, facilities, and staff. (During the trial the Navy gave as its first reason for termination (Transcript, p. 25): "The inability of Mr. Jacobs to estimate a firm completion date *** .")

The defendant formally submitted this time schedule to the Navy, in bar diagram form, in the form of a number of inclosures to a letter dated 15 April 1953. The letter is to be found as Defendant's Exhibit 19, but the bar charts have been removed by the Government for security reasons. This letter, with its diagrammatic time schedule, was hand-transmitted to BuOrd by the defendant the same day it was written, 15 April 1953, so BuOrd could proceed with the minor formal steps necessary for the continuation of the program (he of course did not know that CDR Lemos had drained the Mark 6 budget dry, so there just wasn't going to be any continuation of the Mark 6 program -- since that event in March all the meetings and conferences were just so much shadow boxing.)

The two main arguments of the Schoeffel-Elliott-Lemos group for the termination of the Mark 6 work had been an alleged (and completely fictitious) unwillingness of the contractor to continue the program, and the lack of a full and complete time schedule. The 14 April meeting had dissipated the first excuse, and the defendant's letter of 15 April wrecked the second excuse. It must have come as a nasty shock. To overcome this, Section Re8d wrote an internal memo (new evidence discovered after trial) alleging, "The contractor makes no attempt as to the personnel considerations or as to level of effort requirements to complete the contract in accordance with the outlined time schedule. ***** Therefore a time schedule without a statement as to the

assumed manpower level is meaningless." (The Hinman memo, Appendix 12 hereto, shows they were told that this time schedule would be met with the existing staff -- if they needed any further information they had the telephone at hand). The memo also states, "It is noted that in the subject letter the contractor has not retracted any parts of the proposal set forth in his letter of 4 March 1953. Several conditions in that proposal were considered to be unreasonable." Of course the 4 March letter was a dead issue by now -- the only question under serious discussion was whether the program would be continued or not. The last quoted statement is sheer sophistry.

On 20 April 1953 a group of representatives of NOPI, headed by NOPI's Executive Officer, CDR M. C. McGrath, visited the defendant's plant with the openly stated purpose of determining whether NOPI could successfully take over the Mark 6 project. They were accompanied by BuOrd representatives. After viewing the various pieces of equipment that had been built and were being built, CDR McGrath stated that NOPI did not have the necessary experience, nor the necessary manpower, nor the necessary facilities to take over the Mark 6 project, and further stated that he did not feel they should take it on. CDR McGrath further observed, with a grin, "We should let the Russians have some of Jacobs' circuits. It would take them six years to figure them out."

In an internal Navy memo dated 28 April 1953 (new evidence discovered after trial), Section Re8 stated that comments obtained from NOPI personnel after this visit to the defendant's plant led them to believe that 15 to 18 months would be required, after NOPI took up the Mark 6 project, before they could start work on the project. Hence if NOPI had taken over the Mark 6 at that time, they guaranteed that they wouldn't even get started in the same time that the defendant stated he would complete the construction of the entire system.

Things must have gotten pretty turbulent in BuOrd after this last fiasco, for the attitude of the NOPI representatives removed another prospective good excuse for cutting off the project -- if NOPI had promised quick delivery the problems of the Schoeffel-Elliott-Lemon group would have been over. However, they tried again.

The defendant wasn't having an easy time of it either, for in addition to the continual pounding he was taking from BuOrd, he was faced with the problem that his contract funds were running low, and his staff knew of this and were getting uneasy.

On 7 May 1953 the defendant visited BuOrd (at BuOrd's request) to pick up a letter (Gov. Ex. 12) consisting of 3 pages plus a 2-page inclosure. He was told that this letter contained the minimum conditions for continuation of the Mark 6 program. He was then immediately taken into a technical meeting with Re8's senior engineer, Mr. W. B. Ensinger, and various other Re8 representatives. Mr. Ensinger told Mr. Jacobs that he would have to accept the interim program. Mr. Jacobs then presented his objections to the interim program, and went through a mathematical analysis to show the great degradation of accuracy that would result from the adoption of this program. Mr. Ensinger agreed with the analysis, but pointed out that a decision had been made, and Mr. Jacobs had better go along with it. Mr. Jacobs then pointed out that it would be possible to adopt the interim program and get some useful information from it, if not a useful bombing system. He pointed out that by adding some evaluation instrumentation to the bombing system, one could learn how much of the total inaccuracy was contributed by each part of the system. Thus if the Norden and General Precision components (or any other components) performed badly, this would be spotted by the evaluation instrumentation. Hence the interim system could be used to prove the performance of the JAINCOMP-C computer and the JAINCO navigational system, and certain other Jacobs-built components. Mr. Ensinger agreed that this was a sound scheme, and agreed that evaluation instrumentation should be utilized. The Navy had some of this evaluation instrumentation ready for use, and the rest could be built by the defendant. This proposal to add evaluation instrumentation to the interim system was to merely add another nail to a coffin for the Mark 6 program, for it would pinpoint the source of error in the system -- if the Norden and General Precision instruments contributed an undue amount of error to the interim Mark 6 system, the evaluation instrumentation would show this up, and woe betide the officer who ordered those instruments into the system! At this meeting CDR Lemon emphasized that the Mark 6 was urgently needed for use in the fleet.

When the defendant returned to his plant after the meeting on 7 May and read the letter that had been handed him, he received another shock, for this made a number

of fantastic demands on him. The original performance specifications of the system were to be changed to new ones, and this change would lengthen the program by several years, for most of the constructed equipment would have to be scrapped. One of the new requirements would make the system tactically useless. All of this work was to be performed without one cent of fee. The task restatement included as Enclosure (1) to this letter specifically required the substitution of the interim program for defendant's program, and specifically would have halted the development of the contractor's more precise instruments; yet the Government maliciously testified during the trial (Transcript, p. 27) that the interim program would take place " *** without delaying the program for the development of his unique instruments that he considered necessary for the complete system." NOPI engineers were to be taken into his plant and allowed to go through his files at leisure. They were to be trained in the Mark 6 work, but were not to work under the defendant's control. They were to microfilm anything they wanted in the Contractor's files. And so on. A large number of completely unacceptable demands were included in the letter, which states, "The conditions set forth in this letter and in enclosure (1) are the minimum conditions under which the Bureau of Ordnance can reasonably continue the Bomb Director System Mk 6 project with the Jacobs Instrument Company." The letter was insulting both to the dignity and the intelligence of the contractor. The defendant's reply, dated 11 May 1953 (Gov. Ex. 51) states, after reviewing the Navy's letter, "It is obvious that by insisting on a number of impossible conditions as being the minimum it can accept, the Bureau is expressing its intention of discontinuing work under the subject contract and attempting to blame this Contractor for the discontinuance." The Navy's letter had been an obvious Navy attempt to goad the defendant into defaulting by demanding he meet impossible technical and administrative conditions. It failed in its purpose, for the defendant continued his efforts to get funds to keep the Mark 6 program going.

The problem facing the BuOrd cabal at this point was a serious one. In the face of an urgent CNO directive outlining an urgent battlefield requirement for the Mark 6 system, they had drained funds for the continuation of the work out of the Mark 6 budget. They had tried to halt the project with the statements that the contractor did not wish to continue the work, and had no acceptable time schedule. Those had both backfired. They then called in NOPI personnel, hoping to get from them a statement that they could complete the work faster than the contractor, but got exactly the reverse. Another failure. Next they had written the contractor an insulting letter demanding clearly impossible conditions, hoping thereby to drive him out of the program. This had failed. They were clearly most reluctant to terminate the work themselves, because of the possibility that some day someone would have to answer to the Chief of Naval Operations for chopping off a vitally needed weapon development project in wartime (and in the face of a CNO directive) without a shadow of an excuse. They came up with the perfect answer: a "fall guy". Admiral Parsons, the Deputy Chief of the Bureau of Ordnance, was brought into the Mark 6 program at this point. He wastold that there was trouble in the Mark 6 program, and it was up to him to make a decision as to what should be done. He was given a quick course of training which consisted of visits to several laboratories working on digital computers for military use. He was told in BuOrd (incorrectly) that the work those laboratories were doing covered the same area as the Jacobs program, which was therefore redundant. He was told (incorrectly) that those computers could be used in the Mark 6 system. Actually, the Mark 6 system required a far faster computer than any in existence, or being worked on in a military form in any laboratory. This fact was concealed from Admiral Parsons by keeping him from visiting the Jacobs plant. He was told (incorrectly) that the interim program was merely an expedient for testing the Mark 6 instead of being intended as a battlefield weapon. This same fiction was presented at the trial by the Government (Transcript, p. 27).

Meanwhile an interesting new development took place. On 20 May 1953 Mr. Edward Weitzen, President of the Bulova Research and Development Corp. and Vice President of the Bulova Watch Co., visited the Jacobs plant and spoke to the defendant. Mr. Weitzen said that he had heard, through Navy sources, that the Jacobs organization was experiencing difficulty in getting funds to continue its work. Weitzen stated that if the defendant would turn control of The Jacobs Instrument Company over to Bulova for a nominal amount, he would guarantee that the Navy would get $2.5 million for a laboratory for the defendant's company. The defendant rejected the proposal. On the following day the defendant had a telephone conversation with Weitzen and made the following proposal: A new corporation would be set up, to be owned 50% by Bulova and 50% by defendant. Bulova would put in the necessary facilities; the defendant

would put in know-how and patent rights and personnel. Weitzen agreed that this was a reasonable proposal, and said that he would approach ADM Schoeffel and try to get his agreement to the proposition. He later advised the defendant that ADM Schoeffel had rejected the proposal.

BuOrd's next move started on 25 May 1953, when Lt. Kent called the defendant and told him that BuOrd had decided to station a NOPI engineer at the defendant's plant for training in the Mark 6 program. The defendant pointed out that BuOrd had stated that it wanted NOPI to take over the Mark 6 program, and stated that he was not obligated to train people whose sole purpose was to put him out of business. The Navy increased its pressure on the defendant, demanding that two NOPI engineers be added to his staff for six months. The defendant stated he would be pleased to receive occasional visits from NOPI personnel, but did not propose to add them to his staff. He did offer, however, to give them the same type of general fire control engineering training he had given LCDR Doyle in 1952. Navy pressure continued, and the contractor set forth his legal position on this question in a letter dated 28 May 1953 (Gov. Ex. 14). This listed a large number of reasons why the training of NOPI engineers in the Mark 6 work by the defendant was considered inappropriate. The subject was finally dropped.

On 29 May 1953 the defendant called Lt. Kent and again pointed out that funds that had been placed in the contract were running very low, and would have to be replenished very quickly or it would be necessary to start planning lay-offs. Kent promised to look into this again, and on 2 June called the defendant and said the whole question of the continuance of the Mark 6 work was in the hands of "higher authority", and he could do nothing further.

On 4 June 1953 ADM Schoeffel wrote a memorandum to ADM Parsons, his second in command, as follows (Transcript, p. 1006): "I wish to exhaust all possible means before cutting relations with Jacobs. Weitzen of Bulova called on me today and told me he believes they can set up a satisfactory relationship. While I doubt this, I want to give them a chance. I told Weitzen I would be happy if some means of giving Jacobs adequate backing could be arrived at. Weitzen has proposed very reasonable backing to Jacobs, and the former believes Jacobs will accept it. I hope so, though I am not sanguine." Why ADM Schoeffel felt, at this point, that the defendant needed "adequate backing" when he had set up a satisfactory time schedule with the existing facilities is not at all clear. However, the memo makes very clear that ADM Schoeffel was not pleased with the possibility of a Bulova-Jacobs merger to combine the Bulova facilities and the Jacobs know-how. Note also that very ominous first sentence, which clearly indicated to Parsons what was expected of him.

Mr. Weitzen called the defendant on 11 June and said he had discussed the proposed new company, with 50-50 Bulova-Jacobs ownership, with ADM Schoeffel, but had found no enthusiasm for the suggestion. He added, however, that ADM Schoeffel had asked him to discuss the whole matter with Reed representatives the next day. On 12 June, Weitzen called the defendant again and said that he had discussed the matter with a large number of lower-echelon Navy representatives, and was making the following offer on their behalf: Jacobs was to turn control of his company over to Bulova, and in return would receive permission to use some Navy facilities, funds for the continuation of the program (although the Mark 6 budget had been drained in March at the orders of CDR Lemos, funds could be transferred into it if the defendant surrendered) and "full cooperation". This proposal was rejected by the defendant, who did not wish to give up control of his company. Mr. Weitzen followed the proposal with a long statement of his position. He said he knew that a proposal involving the surrender of the control of The Jacobs Instrument Company would be repugnant to Mr. Jacobs, but he pointed out that certain interests were blocking the progress of the Mark 6 work, and that the defendant needed a "Big Brother" to keep these interests off his neck and permit the work to go forward. He modestly offered the services of the Bulova organization in this patriotic capacity. All he wanted in return was the control of the defendant's company. The defendant rejected the proposal.

On 18 June 1953, LCDR W. T. Doyle, the officer who had received fire-control training in the defendant's plant early in 1952, visited the defendant. He stated he was stationed at the Naval Air Station at Sanford, Florida, but that he had been ordered to temporary duty at BuOrd in connection with a possible termination of the defendant's contract. He had been given this assignment because of his familiarity with the defendant's plant and operations. Doyle did not appear to take the possibility of termination too seriously on this day, apparently feeling the work was far

too important to be arbitrarily terminated.

On 19 June the defendant received a telephone call from LCDR Doyle, who was getting worried. He had discussed the Mark 6 work with Capt. Elliott, who was violently opposed to the continuation of the Mark 6 work at the defendant's plant. Elliott made the assertion that the defendant "wanted everything" and had turned down a million-dollar offer for his company (completely fantastic) when the Navy had tried to foster a merger. Later that day the defendant received a second call from Doyle, who had become highly alarmed. He had attended a meeting in BuOrd at which ADM Parsons, Capt. Elliott, Lt. Kent, Mr. Schweitz, and others were also present. Doyle reported that the following transpired: Capt. Elliott urged immediate termination of the contract, saying that The Jacobs Instrument Company had been difficult to deal with and that the Mark 6 project was unimportant because other companies were going over the same ground and was only a minor research project anyhow. Elliott kept pounding these points home with great emotional intensity. It was revealed that he had been recommending termination since 20 May. A question arose as to how to acquire the defendant's technical data, which was not owing to the Navy under the contract. Capt. Elliott recommended dispatching a contingent of Marines to the defendant's plant to seize the data. LCDR Doyle pointed out that he was very familiar with the work being performed by the Jacobs organization, and that the work was completely unique and very valuable, and he felt that it should not be terminated. He suggested that Parsons read the project file before deciding whether Jacobs was difficult to deal with. He urged ADM Parsons to at least meet Mr. Jacobs, discuss the situation with him, and form his own conclusions. Capt. Elliott opposed this course. ADM Parsons finally decided that under the circumstances Mr. Jacobs was not entitled to a personal interview, but he would grant him one telephone conversation. After reporting the foregoing, Doyle stated most emphatically that a real attempt to stop the Mark 6 work was under way, and that in any formal negotiations the defendant must be prepared to give way on all points as the main charge Capt. Elliott was making was that the defendant was too difficult to deal with. Shortly afterwards Capt. Elliott called the defendant and told him that ADM Parsons would discuss the Mark 6 program with him on the telephone the next day.

The next morning (Saturday, 20 June 1953) Admiral Parsons and the defendant had a long and pleasant telephone conversation. Admiral Parsons explained that the Navy wanted the Mark 6 system developed in the interim form. It was clear that he had been told that the interim system was merely to be used in tests, and he had not been told that there was an urgent military need for the Mark 6 and that the interim system was to be placed in production to satisfy that need. The defendant explained that he felt the interim program would greatly degrade the accuracy of the Mark 6 and would stretch the time schedule. ADM Parsons stated he still wanted the interim system, so the defendant then pointed out that the interim program would yield useful research information, if not a useful weapon, if evaluation instrumentation were added to the interim system. ADM Parsons said he felt this was a good idea, and he felt that an interim system with evaluation instrumentation would be very valuable. He asked the defendant if he would be willing to carry out this program with the existing plant, facilities, etc. The defendant said he would. ADM Parsons then said he would arrange for a meeting between the defendant and ReS personnel to work out the details of the program, and that he would discuss the matter personally with the defendant during the following week. A meeting between the defendant and ReS personnel was arranged for the following Monday, 22 June 1953.

On 22 June 1953 a conference was held at BuOrd attended by Capt. Elliott, Lt. Kent, Mr. Schweitz, LCDR Doyle, and the defendant and an assistant. The discussion concerned itself with the interim program and the proposed evaluation instrumentation. Capt. Elliott expressed himself as being completely opposed to any evaluation instrumentation. When the defendant pointed out that ADM Parsons had agreed to the inclusion of evaluation instrumentation, Capt. Elliott snapped, "Admiral Parsons doesn't have any idea as to what the Mark 6 program is about." He stated that Admiral Parsons had no authority to make such agreements concerning the Mark 6 program, and that he (Elliott) would not accept a program with evaluation instrumentation. Apparently what Capt. Elliott had in mind was the obvious fact that ADM Parsons had been told that the Mark 6 was just a research program, and not an urgently needed battlefield weapon. It was obviously felt that if they told ADM Parsons the truth, it was going to be very difficult to get him to take the responsibility for cutting off such urgent work. Elliott told the defendant that there was an urgent battlefield requirement for the Mark 6 system, and said that even if the interim program greatly decreased

the accuracy of the Mark 6 it would be a useful weapon because their other bombing systems were so bad. The meeting was inconclusive, and another meeting was arranged for the next day. Doyle later reported that Capt. Elliott was so upset over the question of evaluation instrumentation that he was near a state of physical collapse. Doyle reported that Capt. Elliott was also mad at him, and he was being sent back to Florida.

The reason for Capt. Elliott's concern at this point is clear: ADM Parsons had been brought into the program as a "fall guy". He had been given a "quick course" in digital computers by being sent to several laboratories working on such devices, and was told that the defendant's work was merely a duplication of the work in those laboratories, and that the Mark 6 program was only an unimportant research program, and that the defendant was a very unreasonable fellow. All this had been pounded at him with great emotional intensity at the meeting on 19 June in BuOrd, when Capt. Elliott demanded termination and cited these considerations. Elliott's plans had been crippled by LCDR Doyle speaking up unexpectedly at that meeting, and telling the truth as he saw it. This gave ADM Parsons reason to take another look. In the Parsons-Jacobs telephone conversation of 20 June ADM Parsons had even gone on record as favoring evaluation instrumentation (which would, of course, spot the defective components). And Parsons and Jacobs had agreed on an interim program, to be conducted in the defendant's existing plant and with the defendant's existing staff, with evaluation instrumentation. The problem of how to get ADM Parsons to unknowingly wreck the Mark 6 work was becoming very urgent, for the defendant's allocation of funds was running out. How could the problem be solved? The events of the next couple of days tell the story clearly.

A meeting to clarify the question of evaluation instruments was held the next morning (23 June 1953) in BuOrd. Those attending were CDR Hinman, Lt. Kent, Mr. Schweitz, and Mr. Jacobs and an assistant. The pros and cons of the interim program and the evaluation instrumentation were debated in a friendly manner at great length. Having run out of technical objections, the Re8 representatives objected to the evaluation instrumentation on the question of its costing too much. The defendant then stated that he felt that the evaluation instrumentation was so important that he would construct it with whatever funds were budgeted for the Mark 6, without asking additional funds or a cent of fee. This removed the fiscal objections, and a new task statement was drawn up by all present at the meeting for incorporation in the contract and reduced to writing by Lt. Kent. The defendant was told that a meeting had been set up in the Contract Division of BuOrd for 12:30 that afternoon to make this change in the contract, and he was invited to attend. He went to the stated conference room at the stated time, but only CDR Hinman appeared. After about a half-hour delay, about twenty BuOrd representatives walked in together, obviously having come from a conference of their own. It may be mentioned that only three or four BuOrd representatives had attended all previous contract conferences in which the defendant participated -- this number was unprecedented. Among those present were the Contracting Officer (very unusual), patent counsel, facilities experts, a termination specialist, etc. The meeting was presided over by Mrs. Leona Swallen, the contract negotiator on the defendant's contract.

There are two completely different versions of this meeting. Luckily there exists a little physical evidence which helps indicate which is correct. The version of the meeting which the Navy gave at the trial (there are other Navy versions of this meeting) is given in pages 28-31 of the Transcript, and can be summarized as follows:

1. The defendant insisted on an increase in salary to $40,000 per annum.
2. The defendant insisted on having a fixed overhead rate.
3. The defendant demanded an increase in fixed fee from 7% to 8%.
4. The Navy stated that it was going to put an additional $300,000 into the contract to continue the program, and asked the defendant to accept a smaller amount of money to tide him over while the $300,000 was made available.
5. The defendant requested money for refurbishing his plant, although " *** there wasn't any disagreement in that area which influenced termination."

The defendant's version of this meeting (Transcript, p. 1024-27) can be summed up as follows: The defendant, having been warned by LCDR Doyle that Capt. Elliott was fully determined to cut off the Mark 6 program, and was arguing that the defendant was difficult to deal with, went into the meeting fully resolved to take no firm posi-

tion that could be used to honestly justify termination of the contract. The meeting opened with the ReS representatives handing the newly prepared task statement over to Mrs. Swallen for incorporation in the contract. She stated it was not acceptable to her, as it didn't identify each evaluation instrument which was to be built. The defendant pointed out that it wasn't possible to state at that time exactly how that program would work out. He pointed out that the original task statement in the contract was worded in general terms, as is standard procedure in research and development work where the general objectives can be stated in advance, but where one cannot predict the exact course to be followed as this depends on day-to-day developments. Mrs. Swallen stated that the task statement was not satisfactory to her and she was not prepared to discuss it further at this time. The discussion then moved on to other topics. On the issues mentioned by the Government witness (Schweitz), the defendant states this is what occurred:

1. The salary question was raised by Mrs. Swallen, who said she assumed the defendant wanted an increase from his salary of $16,000 per annum. Mrs. Swallen asked what he expected, and he replied, cautiously, that he wouldn't name any figure but would be satisfied with what other people with similar responsibilities were being paid under BuOrd contracts. Mrs. Swallen abruptly changed the subject, for it was known to all present that BuOrd was approving salaries which were far larger than any figure that had been discussed with the defendant, to people with less responsibility.

2. Mrs. Swallen stated that she supposed the defendant wanted a fixed overhead rate. The defendant's contract (Schedule A, p. 6, Par. (G)) had promised him a fixed overhead rate "when a fixed rate of overhead is negotiated and agreed upon." The defendant had been trying unsuccessfully to get to negotiation on this point for four years. The defendant remarked that he certainly would like to see that provision of his contract carried out by the Navy. Mrs. Swallen stated that BuOrd's overhead rate expert was not available on that day, so the question would have to be put off.

3. The question of fixed fee was touched on briefly. The defendant stated mildly that it seemed fair to increase his fee from 7½% to 8% (not from 7% to 8% as stated by Schweitz). It was known by all present that BuOrd was paying fees of 10% to some contractors, so the topic of discussion was again changed abruptly.

4. The defendant takes direct issue with Schweitz's statement that the Navy stated at this meeting that it was going to put $300,000 into the project, and had this sum available in the 1954 budget (On deposition, Schweitz stated that $500,000 was the 1954 budget figure (Schweitz deposition, p. 82) and he apparently changed his story for the trial to bring it into congruence with a Navy memo that was apparently prepared for the trial). The defendant was told at the meeting that there was no money available beyond a small sum which could carry the project for two months, and he replied that it would be difficult to keep his staff together unless he could give them some sort of assurance, even just a verbal assurance, that the work was to be continued. The Navy said that there was no further money and no assurance could be given. As a matter of fact, ADM Schoeffel said on deposition (Schoeffel deposition, p. 18): "It was highly doubtful whether any funds of the 1954 program could be allocated to this project and approved by the reviewing authorities". The Schweitz and Schoeffel testimony are in direct conflict. Other proof on this point is available*

5. The question of money for refurbishing the defendant's plant was raised by Mrs. Swallen. The defendant repeated that he had told BuOrd at previous conferences: The suggestion that his plant be refurbished at Navy expense had been put in his 4 March letter at the Navy's request -- he did not feel the expenditure would be wise because the plant was in too poor condition to be improved markedly in this fashion.

Frequently during the meeting, the defendant rem ', "We are here to negotiate a contract amendment to permit continuance of the Mark 6 work, let's get down to business." This was always met by cold stares. After an hour or so, the BuOrd representatives began to trickle out of the meeting. By 5:30 only a few people were left, and the meeting was concluded when Mrs. Swallen announced she was going home as she wasn't receiving overtime. It was agreed that negotiations would be continued at another meeting. It may be noted in passing that the Navy told the press: "Mr. Jacobs presented his demands and when BuOrd said it couldn't go for them, Jacobs upped and packed his briefcase and walked out." This is a direct quotation from

* The Navy's internal Termination Request (Gov. Ex. 8), dated 26 June 1953, gives a shortage of funds as one of the two reasons why termination was requested.

the Navy's Public Information Officer, and it appeared in the Washington Daily News on 14 July 1953. That it is false was grudgingly admitted by Navy witnesses on deposition.

This meeting was the last one held before termination (the meeting with ADM Parsons which Mr. Jacobs was promised was called off), so it is very important to establish who was telling the truth about it. The defendant's handwritten diary entries for the two meetings held on 23 June are as follows (Transcript, p. 1100): "23 June -- Had conference at Re8d, BuOrd. Those participating were CDR Hinman, Lt. Kent, Mr. Schweitz, Mr. Winkelman, and Mr. Jacobs. The proposed interim program for the Mark 6 was discussed at great length. Re8d representatives finally agreed to let Jacobs do some instrumentation of the Mark 6 system, but did not feel they could put up any additional money for this purpose. Jacobs felt that instrumentation was so important that he offered to try to build some with any money he could eke out of the contract. Re8d representatives agreed to this. At 12:30 PM had a further conference with the above plus Mrs. Swallen, Neil Hundt, Capt. Smith, Mr. Jones, Mr. O'Brien and many others. The avowed intent of the meeting was to negotiate a contract for the interim system. However, the attitude of the BuOrd representatives was that we should not negotiate an agreement now but rather we should wait for a few months (why?) and should accept a $60,000 extension of the present contract. I objected, stating that if they wanted to negotiate a contract now, I was quite willing, but I could not keep my staff together with only a two month contract extension."

That evening, after the meeting, the defendant had a final telephone conversation with LCDR Doyle, who was leaving immediately for Florida. Doyle reported that he had dropped briefly into Re8d that morning and that a representative of the Consolidated Vultee Aircraft Corp. (Convair) was there. This man (Mr. Harvey Tate, a Vice President) told the Re8d representatives that Convair wanted to acquire The Jacobs Instrument Company, and stated he wanted the Mark 6 contract terminated so the defendant's company would be forced into an impossible economic situation, and thus would be easy pickings for Convair. He also stated that Convair wanted the defendant's technical know-how for its own use and pointed out that this could be obtained for Convair by BuOrd during the termination proceedings.

On the next morning (24 June 1953) the defendant had a telephone conversation with Mr. Schweitz of BuOrd. This telephone call was the last communication on contract matters between the defendant and BuOrd prior to termination, and was the one key event between the end of the second 23 June meeting (when things were left undecided) and the termination itself. Mr. Schweitz's deposition on this subject (see Schweitz deposition, p. 98, and Transcript, p. 1183) ran as follows:

Q. Now, this termination was on June 26, I think. You had had a meeting -- by "you", I mean BuOrd -- with Mr. Jacobs on June 23.

Now, what happened in between the end of that meeting, at which I think you told me that was still open, and the date of termination to make you terminate?

A. Well, it was still open largely because it was impossible to reach an agreement.

Q. Correct me if I am wrong, sir. Did I not understand that at the termination of the June 23 meeting it was, according to you, sir, understood that you would continue to negotiate and meet at a later time?

A. Yes.

Q. Well, what happened between that time and the termination date to make you terminate?

A. In talking to Mr. Jacobs, there was no sign of any basis for negotiation.

Q. By "talking", you mean yourself talking to him?

A. Either Lt. Kent or I.

Q. Would you mind telling me, sir, if you know, what Mr. Jacobs said that leads you to that conclusion?

A. I can't quote verbatim on that.

Q. Could you give me an idea?

A. But he reiterated his previous stand that the evaluation must be an extremely extensive preparation on the interim equipment; further, that there was no disposition on his part to compromise his demands for the condition of continuance of the work as regards contract and administrative conditions.

Well, that is one version of the 24 June telephone conversation. The Navy's official version is to be found in an Re8d memo of 25 June 1953 (Def. Ex. 2 of 9 February 1956) (new evidence discovered after trial) which states: "Mr. Jacobs called Re8d and stated that if the Bureau was willing to negotiate a new contract it could be accomplished by Friday 26 June, so that he could notify his staff that he had obtained written agreement that the Mk 6 project would be continued, and that he was unwilling to accept a limited extension of the existing contract. All interested Divisions were notified of this reply."

Luckily this conversation of 24 June 1953 was tape recorded, so we can accurately reconstruct history and see whether the Navy's story is correct, and whether ADM Parsons was told the truth or a falsehood in order to get him to recommend termination of the contract. The verbatim transcript (Def. Ex. 3 of 9 February 1956) follows:

Mr. Schweitz: Aviation Ordnance, Schweitz.

Mr. Jacobs: Good Morning. Is Lt. Kent in?

Mr. Schweitz: He has just stepped out for a minute.

Mr. Jacobs: Well, this is Mr. Jacobs calling. I guess I can give you the same message I proposed to give to him.

Mr. Schweitz: All right. All set.

Mr. Jacobs: Well, I have been thinking over our conversations of yesterday and I've reached certain conclusions.

Mr. Schweitz: Well, that's fine.

Mr. Jacobs: Well, in the first place, I have the definite feeling that when we were down there yesterday in that meeting in the afternoon, that there was no intention on the part of the Bureau of negotiating a contract.

Mr. Schweitz: I don't know what leads you to such a feeling as that.

Mr. Jacobs: Well, nevertheless that was the feeling, and is the feeling. Now, I don't know where that leaves us but I guess it leaves us where we are. When the Bureau desires to negotiate a contract, I will be more than delighted to sit down and discuss the thing and enter into negotiations. But until the Bureau wishes to do some negotiating, there obviously is no point to attempting to negotiate. So that is one point. A second point that I pass on for information: there is a possibility that the Bureau is lingering under some delusion to the effect that it may be possible for me to become absorbed by some large organization. If there is such a delusion I would suggest knocking it off, because I do not propose to become enmeshed in some large organization, come Hell or high water, and if it means my going out of business to avoid this, then I will go out of business. But I am not going to become part of some large organization. If I could think of a stronger way of stating it I would state it, but those are my feelings.

Mr. Schweitz: I think we are pretty familiar with that sort of conclusion.

Mr. Jacobs: Fair enough. Well, that . . . there it is, and you may pass on to Lt. Kent such of it as you wish.

Mr. Schweitz: Well, may I ask what indication would cause you to alter the first statement there?

Mr. Jacobs: Well, any time the Bureau says, "Let's negotiate a contract" and sincerely enters into negotiation, OK, let's negotiate. But this stuff of saying "We just can't negotiate at the present time -- we can negotiate at some other time" just doesn't make any sense to me. As far as I can see it, our contract is running out. It looks like a good time to negotiate a new contract. So, if the Bureau wants to negotiate one, I want to negotiate one. But if the Bureau takes the attitude, "Nuts, we'll negotiate a new contract sometime next August, why should we bother negotiating one now?" -- this doesn't make any sense to me whatever.

Mr. Schweitz: When it comes to settling questions that are beyond the cognizance of the people who are in the meeting, why a postponement for a day or two on the details of the negotiations certainly seems logical to me.

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Mr. Jacobs: Well, a day or two -- sure, but a month or two -- no. This business of saying, "We can't negotiate this thing for two months" just doesn't strike any chord of sympathy at all on my part. I just don't see any significance to two months. I can see significance to several hours so they can talk to somebody -- OK.

Mr. Schweitz: Well certainly you can see the significance to the fact that we can't use '54 money and there isn't any '53 money.

Mr. Jacobs: Well, I can see significance to the possibility of negotiating a contract now of the same type we have had in the past, where money is put in as it becomes available. '53 money can be put in. When '54 money becomes available, that can be tossed in. This is the mechanism we used previously. It worked satisfactorily. It looks like a sound and solid answer to all these fiscal objections.

Mr. Schweitz: Well now hasn't it been necessary to amend the contract to put in new money each time?

Mr. Jacobs: Sure. But just a very nominal amendment. Just a letter amendment -- not even any negotiation involved.

Mr. Schweitz: But the previous contract did not carry the obligation of additional funds.

Mr. Jacobs: Why not?

Mr. Schweitz: Well it didn't. Every amendment has been the obligation of the additional funds, increasing the amount in it.

Mr. Jacobs: Sure, so?

Mr. Schweitz: So we couldn't say, "$300,000 and at the present time we are putting in 60".

Mr. Jacobs: Why not? That's what the present contract . . . The present contract said $700,000 and started off with a contribution of 75,000.

Mr. Schweitz: Yes, and then . . . Did it state 700,000 at the time?

Mr. Jacobs: Yes, sir. Sure did.

Mr. Schweitz: I find this very hard to go along with.

Mr. Jacobs: Well, take out the contract and read it. You have it.

Mr. Schweitz: It certainly is unorthodox as far as I know . . .

Mr. Jacobs: This is standard procedure in the Bureau.

Mr. Schweitz: Hmm?

Mr. Jacobs: This is standard procedure. It is the way 10,531 is written up. The original estimate was not 700,000 but 550,000. But that's the way it is written. "This is a contract for $550,000. We only have $75,000 now. That's the amount we are putting in." And that's the way the contract reads.

Mr. Schweitz: I sure will want to check up on that.

Mr. Jacobs: Well, you will have every opportunity to do so. You certainly have all the papers.

Mr. Schweitz: Incidentally, Kent is here now if you would like to talk to him.

Mr. Jacobs: Well, I guess you can pass my message on. There's no point in repeating it.

Mr. Schweitz: All right, I certainly will.

Mr. Jacobs: Thank you very much.

Mr. Schweitz: Good bye.

Mr. Jacobs: Good bye.

A study of this conversation shows clearly who was telling the truth about the 23 June meeting and it also establishes what transpired in the 24 June telephone conversation.

It is to be noted how cleverly and decisively things were handled at this point. The completely false story of the 24 June telephone conversation was spread through BuOrd, and a meeting to discuss the situation was held the next morning (25 June 1953)

in ADM Parsons office. Those determined to block the Mark 6 work now told the Admiral at the 23 June afternoon meeting that the defendant had stated he was not willing to accept the interim program; that he had made a series of unreasonable demands (salary, etc.); that when BuOrd refused to accept these demands he had packed his briefcase and walked out; that in the telephone conversation of 24 June he had demanded that BuOrd execute a new contract by 26 June (see Def. Ex. 2 of 9 Feb. 1956). Obviously there was nothing further to be done with this fellow. (It may be noted parenthetically that Lt. Kent, who was the Mark 6 Project Officer, refused to attend this meeting, not being willing to endorse such falsehoods). ADM Parsons was literally overwhelmed by this testimony, and agreed that under the circumstances there was no alternative but to terminate. He thereupon recommended termination to ADM Schoeffel, who acted immediately.

On 27 June 1953 the defendant received a telegram dated 26 June 1953 from BuOrd stating in part, "You are hereby notified that upon receipt of this message your Contract NOrd 10531 is completely terminated in the best interests of the Government in accordance with Article 23 of said contract." The defendant also received a letter (Part of Gov. Ex. 1) from BuOrd dated 26 June 1953 which gave formal notification of termination. This letter is important, and is included herewith as Appendix 13. It was prepared by BuOrd's Office of Counsel and bears their identification mark. It requires that the defendant deliver the technical data which is one of the items in dispute in this suit. The Bureau of Ordnance realized that these items were not owing under the contract, and sought to convert this letter to an Amendment to the contract which would make these items due to the Government. The defendant was asked to sign and accept this amendment, but did not do so. This was BuOrd's second attempt (the first was the contract amendment proposed in the Enclosure to its letter of 6 May 1953 -- Gov. Ex. 12) to get the contract modified to make the contractor's technical files legally available to BuOrd, and the second failure.

The defendant received the notice of termination on a Saturday morning (27 June). On the following Monday (29 June) the defendant received a telephone call from a Convair representative saying that the termination could be rescinded if the defendant would surrender control of his company. The next day the defendant repeated this piece of conversation to CDR Lemos in a telephone conversation, and asked if this was true. CDR Lemos would make no comment.

On 14 July 1953 a large Navy contingent visited the defendant's plant to discuss the mechanics of performing the termination. At the outset of this meeting the Navy made a third attempt to gain possession of the defendant's technical data by stating that it proposed to seize this data because some of it related to a Confidential project. The defendant pointed out that the right of the Dept. of Defense to classify material as Confidential was not intended to be a means of seizure. The Navy did not agree with this point of view, although it was stated that further instructions would be obtained. It was agreed that the defendant's company would inventory everything in the plant connected with the Mark 6 work. The matter of the defendant's obligation under Article 17 (b) of the contract was discussed. This article required the defendant to submit a report of the project, and the defendant requested instructions as to just what was wanted. He was told that a simple report would suffice. The defendant pointed out that he was asserting complete rights to all technical data. During this conference a Navy stenographer was hidden in a group of representatives, and was taking notes of the conversation. The defendant finally discovered this, and brought a tape recorder into the meeting and set it in front of the Navy representatives and turned it on. A quite mendacious word-for-word transcript of this conference was put in evidence during the trial by the Government as its exhibit No. 39. A correct transcript, with a side-by-side comparison with the false Government version, was put in evidence by the defendant as his Exhibit No. 1 of 9 February 1956. It is interesting to note that on 9 February 1956, the defendant brought into Court, at the request of the Judge, his tape recorder and the original tapes of various documents offered for comparison with alleged Navy transcripts. The Court asked that the U. S. Attorney be permitted to hear the tapes to assure himself of the authenticity of the defendant's exhibits, and the defendant agreed. However, the U. S. Attorney never showed any interest in listening to these tapes. By this time he was well aware of whose exhibits were false.

On 15 July 1953 the defendant had a telephone conversation with a Capt. Kelley, who on that day was the Acting Chief of BuOrd. That officer requested that the Navy be given access to the defendant's technical documents. The defendant generally

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agreed to grant this access if it was agreed that the original records belonged to him, and if there would be no attempt to seize the originals. At this point the defendant was very disappointed over the termination of his contract, but he was willing to try to help the Navy continue the work. He naively assumed that he would be permitted to carry on his weapons development work with other Government agencies, but he was to find this assumption to be sadly in error. This conversation was recorded by both sides. The Navy version (which was tampered with somewhat) is Gov. Ex. 15. The defendant did not have the time during the trial to get a correct version of this very long conversation transcribed.

On 17 July 1953 Lt. Kent and Mr. Schweitz visited the defendant to discuss what length report should be written to discharge the defendant's obligation under Article 17 (b). It should be borne in mind that the defendant received not a cent of fee for all the work performed during the termination phase (as a matter of fact, he has never even been reimbursed for all his expenses). Yet, even knowing this would be the case, the defendant offered to write reports requiring 1, 5, or 12 months of effort for the Navy. This is shown in a Navy letter dated 28 July 1953 (Gov. Ex. 9 and Def. App. 14). This letter shows that the Navy selected the one-month report. It is specifically to be noted that the choice of the short report was the Navy's own choice -- they were offered longer ones and rejected them. Later, during the trial, they were to say they wanted more information, and implied that they were short-changed with the report they received. The defendant wanted to make sure it was understood by everyone that this report was to completely discharge him of all obligations under Article 17 (b), so he wrote an inquiry to this effect on 3 August 1953 (Gov. Ex. 10 and Def. App. 15). The Navy's reply (Gov. Ex. 11 and Def. App. 16) was cautiously worded, but clearly indicated that if the report covered the topics contained in an outline shown to BuOrd representatives on 7 August 1953, it would be accepted. During the trial the Navy tried to imply that the report did not cover these topics, but the Court finally made a finding that it did cover these topics, and was accepted by the Navy. It is to be noted that this Navy letter is from the Chief of BuOrd, who is certainly authorized to speak for that organization.

The Court argues (Trans. pt, p. 813 and Def. App. 1) that the Navy accepted the short report in the belief (derived apparently from the Kelley-Jacobs conversation of 16 July) that it would have access to the defendant's files, and then leaps from this incorrect premise to the most amazing conclusion that therefore the defendant must make his files available to the Navy. The Court's premise is probably incorrect, for a memorandum prepared by Capt. Elliott (Gov. Ex. 21) in September 1953 shows that BuOrd was not particularly desirous of getting access to the Contractor's files during this period, so this could scarcely have been the basis of their thinking. Specifically, Capt. Elliott wrote to his superior, on 14 September 1953, "It is realized that drawings, notebooks, etc. would be helpful, but not absolutely essential, for the continuation of the project." Why any Navy assumption, whether false or correct, should act to deprive the defendant of valuable property is not at all clear. It is further pointed out that many weeks before the report was delivered, relations between the defendant and the Navy had broken down to the point where it was perfectly clear to the Navy that they were not going to get access to the defendant's files; yet they did not revise their requirements for a report, but continued to express satisfaction with the report the defendant was preparing. The Navy expressed great satisfaction with the report when it was received.

The Government stated in Paragraph 8 of its Complaint in this case (p. 29 of Gov. App.) that the report was accepted, although it tried to back out of this during the trial.

For a period of several days in early July 1953 the defendant even was willing to permit some microfilming of his technical files, but he began to raise objections to this when, on 20 July, he was told by CDR Lemos in a telephone conversation that this material would not be used only by NOPI, but would be turned over to the defendant's commercial competitors. The defendant's position became stronger when he discussed this matter with counsel on 21 July, and was advised that he was not obligated to turn his files over to the Navy, and it would be commercially and legally injurious to him to do so. The defendant communicated this stand to CDR Lemos. One of the important legal issues raised at this time was the DeForrest Case (59 Court of Claims 914). The decision in this case was to the effect that when an inventor gives another party technical data on an invention, that act constitutes the granting of a license to the use of the invention, even if the invention is patented. The defendant was warned that if he turned his technical data over to the Government, this act might be con-

strued as a license for its use. The defendant had two important telephone conversations with Mr. Gerald D. O'Brien, Patent Counsel of BuOrd on the patent issues (there were a number to be considered) that arose between the defendant and the Navy. During the trial of this case the Government put in evidence (Gov. Ex. 16 and 17) two highly imaginative accounts of these conversations. Exact transcripts of the conversations were put in evidence by the defendant during the hearing of his motion for a new trial (Def. Ex. No. 4 and 5, of 9 February 1956). It is highly informative to compare the correct and Government versions of these telephone conversations.

In mid-July 1953 the defendant brought to the attention of the Senate Small Business Committee and several important Government officials some of the matters connected with termination of his contract. An investigation of the matter was launched by the Senate Small Business Committee, which requested from the Navy a statement as to the nature of its relations with the defendant. The result was a document prepared by BuOrd's Office of Counsel, and signed by ADM Schoeffel (Def. Ex. 21). This document described the work under this contract as " *** in essence to consist of the development of a complete bombing system of considerably greater accuracy than that achieved by any system then in existence." Of the interim program the document states, "It was, of course, realized that such limitations as were known to exist in such proved components would be carried over to the new system but, nevertheless, flight evaluation of the system could be made to prove the worth of the system and if satisfactorily tested justify in the future additional research and development money expenditure." The document also says, "Throughout the period of performance of subject contract the work done by the company was considered more than satisfactory and in many respects of extremely high quality. It should be noted, however, that while the research and development contract called for drawings prepared to Bureau of Ordnance specifications and progress reports, from time to time, making full disclosure of all work done and the results thereof, the Bureau of Ordnance, realizing the limited number of the personnel of the company and the time and cost involved in preparing such in customary form, accepted selected company working memoranda for files in lieu thereof from time to time." It is to be noted that the Chief of BuOrd admits in this last sentence that the company voluntarily gave copies of its own memoranda to BuOrd and thereby discharged its obligations under Article 17(a) of the contract. The Government tried to bring this article into issue during the trial, but the defendant feels that this statement of BuOrd disposes of that issue clearly and effectively.

The Senate Small Business Committee was by no means satisfied with the BuOrd statement, and its inquiry began to expand. The Navy frantically tried to cut off this inquiry, and even sent a retired Navy Captain in to see the Committee. This Captain neglected to tell the committee that he was the President of a company that was trying to take over the Mark 6 program (and which was about to become a General Precision subsidiary) -- he merely said that he represented the Navy, and was an expert on bombing computers, and could assure the committee that the work performed by the defendant's company was unimportant and the termination was not worth investigating.

In August 1953 the defendant was advised by BuOrd that a Navy investigation (triggered by complaints from the fleet on the question of faulty performance) was looking into the situation concerning the faulty Norden bombing system that the defendant had offered to replace with a better system. Also in August 1953 a Washington newspaperman, who had watched with considerable horror BuOrd's wrecking of the Mark 6 program, took up this matter with Sherman Adams of the White House staff. Adams ordered the Secretary of the Navy to launch an inquiry into this situation.

These various inquiries and investigations must have scared BuOrd greatly, for a week after the newspaperman had spoken to Sherman Adams, LCDR Puryear (the original project officer on the Mark 6 work) was called to Washington by BuOrd, and was given a very urgent briefing, then was told to call the defendant. Puryear called the defendant on 18 August and stated that he had just had a two-day session with CDR Lemos and CDR Refo (the officer in charge of the internal Navy investigation) and could tell the defendant that unless he took action immediately to halt all investigations into BuOrd's activities, he would be the subject of an intensive BuOrd smear campaign, would certainly have his career destroyed, and might well be jailed. The defendant refused to intervene in any way in any official investigation. On the next day the defendant told the Senate Small Business Committee of the BuOrd threat, and the Chief Counsel and the Assistant Counsel of the Committee called LCDR Puryear and cross-examined him about his conversation with the defendant. They received full

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confirmation of the defendant's statement about the BuOrd threat.

It can be stated at this point that the Senate Small Business Committee's investigation continued, and when it became clear that BuOrd was determined to wreck the defendant, the Senate Armed Services Committee was called in. That organization investigated the matter for about a year and a half, starting early in 1954. At the end of 1955, the Bureau of Ordnance was relieved of its authority to contract for aviation fire-control equipment.

Being vitally concerned with keeping his organization together, the defendant began to get out proposals for various types of new weapons systems to various branches of the Armed Forces. These were not minor gadgets, but major and important (and vitally needed) weapons. However, when the time came to contract for these devices, it was apparent that a "block" had been placed on the defendant throughout the Armed Forces. This was illegal, for to bar a contractor from contracting, it is necessary that the Armed Forces bring formal charges against a contractor, and give him a chance to defend himself. If he cannot, he is placed on an official blacklist. Unofficial blacklisting is illegal, and it clearly indicates the type of pressure being brought to bear on the defendant. Meanwhile, many members of his staff were resigning because of the contract termination.

In August 1953 another factor arose to complicate the relations between the defendant and the Navy: the Navy's Cost Inspection Service told the defendant that it would stop reimbursing him for termination costs unless he changed his accounting system (a system which they had been praising as perfect for several years). This began a series of arguments between the defendant and a series of Navy representatives. The situation became of increased intensity in September 1953 when the Navy refused to pay the August voucher. This situation completely blocked any hope of agreement on the question of the Navy getting access to the defendant's technical files, and that subject was completely dropped.

On 14 September 1953 the defendant received a call from Mr. George Carter, a Senior Negotiator of the Bureau of Ordnance. He stated that it was the general feeling in BuOrd that the contract had been terminated over trivialities, and he would like to straighten these out and arrange to continue the Mark 6 work. The defendant was very pleased, and agreed to meet Mr. Carter for a discussion of the matter. The proposed meeting was postponed when Mr. Carter was called in for a meeting with Admiral Schoeffel. After that meeting Mr. Carter stated that there was no hope of reinstating the Mark 6 work. Mr. Carter's attitude was typical of that of nearly everyone in BuOrd: the Mark 6 program should be continued. Only a very few (but important) people were determined to stop this work at all costs.

During all this period (July-September) work had been going forward on the final report. It was not being completed as quickly as had been hoped because of staff resignations, and because the defendant felt that it was necessary to make it quite complete in order to forestall any future claim that it was other than full and complete. However, the Navy kept pressing for delivery, and hinted that the blocking of the August voucher would be released as soon as the report was finished. On 1 October CDR Lemos visited the defendant and reviewed the status of the final report that was being prepared under Article 17 (b) of the contract. He expressed great satisfaction with it and stated it was just what the Navy wanted. The next day Mr. Carter of BuOrd called the defendant and stated (his exact words): "I talked to CDR Lemos a few moments ago and he told me that he enjoyed very much his visit to your plant and that he was well pleased with the progress being made there. Now I think that we're in a position to see that your vouchers and such will go along smoothly. He was very well impressed about your discussion and he felt that there was a lot more in the report than he had thought would be there, and I want to thank you very much for getting everybody satisfied." This conversation shows clearly that the Navy was putting pressure on the defendant (blocking of vouchers) to speed up his work on the report, and that the defendant was doing a painstakingly careful job on the report in spite of this pressure. This is important to remember in view of the Navy's contentions during the trial that the report was inadequate, and hence they must be given access to defendant's files.

In October 1953 representatives of the Monroe Calculating Machine Company approached the defendant and told him they knew of the Mark 6 situation and would like to work out a mutually satisfactory merger arrangement so they could get into the Mark 6 program. It appeared possible to arrange mutually satisfactory terms, and

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Monroe's President, Mr. W. G. Zsenglein, visited BuOrd and offered the combination of Monroe's extensive facilities and the defendant's know-how to BuOrd for the continuation of the Mark 6 work. CDR Lemos rejected the proposal, saying that BuOrd had no further interest in the Mark 6 program. It was clear that BuOrd would only be interested in having the defendant's firm absorbed only by General Precision.

On 26 October 1953 the defendant visited the Bureau of Aeronautics to discuss possible contracting with that organization, but was told by an official that BuOrd had issued instructions that the defendant's organization was to be frozen out of existence.

On 26 November 1953 the defendant was advised by an official of the Office of the Inspector of Naval Material, through which the defendant's final report had been sent to BuOrd, that he had read it and considered it very good.

During this fall the defendant spoke to many military agencies about numerous new weapons systems and components he had conceived and could make for them. He found much interest, but matters never reached the contracting stage.

During this fall, The Jacobs Instrument Company had been inventorying all items in the plant (i. e., all physical property) that had been associated with the Mark 6 work. This work was performed by Mr. W. M. Winkelman, the company's office manager. He had started inventorying some of the simpler items whose ownership was clear, and had headed his inventory lists with a statement to the effect that these were Government-owned items. His secretary had continued to put the heading on later lists. This came to the attention of the defendant in November 1953, and he called the matter to the attention of Mr. Winkelman, pointing out that the question of the ownership of some of the physical property was very complex, involving questions of know-how, patent licensing, and commingling of property. Mr. Winkelman stated that he had come up against some questions of ownership which appeared too complex for him to resolve, too. On 2 December 1953 Mr. Winkelman visited the Office of the Inspector of Naval Material in Baltimore and discussed this matter with a number of Navy representatives, pointing out specifically that the property list headings were misnomers, and had been placed thereon inadvertently. It was agreed at this meeting that a further meeting was to be held to determine exactly how this question of ownership should be resolved.

In December a representative of the American Machine and Foundry Company told the defendant that the President of that company had contacted Admiral Schoeffel's office about an AMF-Jacobs merger to continue the Mark 6 work, but was turned off.

At the end of 1953 the defendant's company actively entered the manufacture of electronics components to remain in business, for BuOrd had effectively forced it completely out of the weapons development field. This component manufacture began to build up in quantity early in 1954. These components were sold to various big companies for use on their military contracts, the components being of a type which were used almost exclusively for military purposes.

Early in 1954 the defendant conceived a revolutionary advance in airborne fire control systems, and advised an official of the Bureau of Aeronautics (BuAer) of the Navy about this. Several days later this official told the defendant that BuAer would like very much to contract with the defendant for this latest development (and others conceived by the defendant) but that BuOrd had issued instructions to BuAer that no contracts were to be issued to The Jacobs Instrument Company, and personal reprisals had been threatened against any official who violated this ban. Several days later the defendant approached the BuAer official with still another airborne fire control system, and was told that BuAer would like to contract for this, but couldn't because of BuOrd's attitude. He did say, however, that he would look into the possibility of overcoming BuOrd's hostile influence. A week later he reported that BuOrd was determined to block any projects proposed by defendant's company, regardless of their importance to national defense, and that there was little that could be done about this. This statement received further amplification when, the next day, the defendant was advised by an ex-Air Force officer who was in close touch with the Air Force, that he had been told in the office of the Secretary of the Air Force that instructions had been passed, at the level of the Secretaries of the Armed Forces, that the defendant's company was to be blocked out of all contracting, regardless of the national defense implications, until it merged with a politically favored organization. On the following day a representative of the Inspector of Naval Material visited the defendant's company and stated that BuOrd had discovered that it couldn't continue the Mark 6

project without the defendant's assistance, and that it expected him to shut down his company, surrender all its property to the Navy, and take a job with the big company to which the Navy would give the Mark 6 project.

Early in 1954 the defendant interested the Air Force in continuing work on the Mark 6 project. The Navy blocked off this attempt, however.

On 25 February 1954 the Navy sent the defendant a letter advising him that it would not reimburse him for termination costs incurred after 26 February 1954. The immediate question this raised was whether the defendant should retain armed guards (as the Navy had required up to this time), to protect the classified material (physical property and technical documents) in this plant. Up to this time the Navy had insisted on the presence of such guards, and had paid for their use. The defendant made inquiry on this subject. Another question that arose at this time was brought up in a Navy letter to the defendant dated 26 February 1954. It said, in part, "It is requested that prior to the fulfillment of "Requests for Literature" all information to be released be cleared through the Bureau of Ordnance." Obviously BuOrd was going to try to use security regulations in a devious way to shut off the defendant's commercial business (manufacture of electronic components). The Navy's attempts to use security regulations to squeeze the defendant were increased when two security officers visited the defendant on 1 March 1954. The defendant pointed out that he had a burglar alarm system in his plant which had previously been approved by other security officers for use in lieu of guards, and he suggested the use of this system in place of armed guards, which he couldn't afford to hire, and which the Navy now refused to pay for. The security officers, without bothering to look at the alarm system, now pronounced it unsatisfactory (security regulations at that time permitted the use of an alarm system instead of guards, and other defense contractors in Bethesda were using such alarm systems instead of guards, with Navy approval). However, they refused to say whether the defendant would be required to have armed guards, although they said he would be required to obey security regulations (which required either an approved alarm system or guards). On 3 March the Navy advised the defendant that, on the question of guards, he would have to live up to his security obligations.

The defendant had been in constant touch with the Senate Small Business Committee during the fall and winter of 1953, while their investigation of the Mark 6 situation continued. On 5 March the Assistant Counsel of that Committee called the defendant and stated that the Committee's work on this project was continuing, and that it wished to do everything it could to help the defendant. The defendant reported how security measures were now being used in an attempt to squeeze off his commercial business and place him in a financial squeeze. The Committee Counsel was quite horrified, and said he would see about taking further action. Several days later the case was transferred from the Senate Small Business Committee to the Senate Armed Services Committee, which launched an immediate investigation into the whole affair.

Early in March 1954 the defendant worked out the final contract details of an agreement to build for the Army a revolutionary new type of artillery computer he had proposed some months ago. However, this project was blocked off at this point.

In March the defendant had several discussions with Navy representatives on the subject of closing out the contract. He wanted to close out the entire contract and get all issues resolved, and offered to turn all physical property over to the Navy if they would drop the issue of having access to defendant's technical files. The Navy representatives first accepted this, then rejected it. They finally took the position that the defendant would have to turn over all physical property and throw his files open to them; later on they would discuss other issues (patent questions, settlement of fixed fee, etc.). They said they had no authority to discuss anything but the Navy's acquisition of the defendant's property and files; they had no authority to discuss final settlement of the contract. This attitude obviously could not lead to an overall settlement.

On the question of guards, the defendant was personally forced to start guarding the plant at this time with another employee: for two years they were each to spend alternate nights in the plant, which was unheated in winter and stifling hot in summer. It was a terrible physical ordeal for both individuals. This was forced on the defendant by Navy threats of citing him for security violation if he did not maintain an armed guard service. It is interesting to note that when the District Court held that if the Navy demanded a guard system, it should pay for it, the Navy

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immediately removed the requirement for a guard system.

The defendant felt most strongly that the Navy was attempting to use security provisions for attaining ends never contemplated when the system was set up, namely the imposing of financial and physical pressure on a company in an attempt to force it out of business, and early in March 1954 he brought this matter to the attention of the Office of Counsel of the White House, which had just been designated by the President as the office to study such abuses. The result was an investigation initiated by that office, and this was to have interesting fruits in several months.

On 17 March 1954 the defendant had a discussion with two BuOrd representatives (Mr. Carter and Lt. Kent) about contract settlement. As before, they wanted the defendant to surrender all property and documents before settlement was discussed; the defendant wanted all issued resolved at once in order to forestall a continuous series of outrageous demands, for it was clear that if he surrendered the property and documents being demanded, the next step would be a demand that he shut down his company and become an employee of General Precision, to help them finish the Mark 6 system. During this conversation the defendant protested vigorously about BuOrd blocking his contracting with other Government agencies. Both Carter and Kent admitted this was being done, and Kent stated that it would continue even after the contract was settled. He said his section was giving its "frank opinion" of the defendant, and would continue to do so. It was clear that the smear campaign was in full effect, and it has continued with the utmost vigor to this day, and the defendant's professional reputation, which was quite respectable, has been completely destroyed by BuOrd's continuous libelous attacks.

In the middle of the night of 18 April 1954 a Navy security officer visited the plant and spoke to the defendant, who was guarding it. This man said that the plant would have to be guarded, but that the Navy wanted to see hired guards in the plant (obviously an attempt to increase the financial squeeze) instead of having it guarded by regular company employees. The defendant pointed out that he and the other employee guarding the plant were more familiar with security procedures and the use of firearms than the usual hired guard, and that he did not propose changing his guard system.

On 10 May 1954 a counsel in the White House called the defendant and told him that the White House investigation had shown that the work of the defendant and his company on the Mark 6 had been fine, and the White House felt that the work should be continued. The defendant was asked to communicate with ADM Schoeffel and request an interview with the intention of discussing ways and means of getting the Mark 6 program moving again. The defendant agreed, and requested an appointment. ADM Schoeffel's office stalled on granting the appointment, and on (11 May) the next day the defendant received a veiled hint that he would be killed if the pressure on the Navy for the continuation of the Mark 6 work was not relaxed. Finally, on 28 May, the defendant was granted an interview with ADM Schoeffel. ADM Schoeffel contemptuously dismissed White House interest in the Mark 6 program and said no funds were available for the continuation of the work at The Jacobs Instrument Company. It is interesting to note that ADM Schoeffel's indication that the White House did not have sufficient power to cause the Mark 6 program to get started again was confirmed, many months later, by counsel of the Senate Armed Services Committee who stated that there was a tremendous amount of money and massive political pressure behind the blocking of the program.

In the spring of 1954 the Navy obtained a secret hearing (of which the defendant received no notice, and at which he was obviously not present) before Judge W. Calvin Chesnut of the U. S. District Court in Baltimore. As a result of this in camera procedure, a Court Order (Def. App.17) was issued, and was served on the defendant on 17 June 1954. This order required the defendant to show cause why all the physical property and technical data demanded by the Navy should not be turned over to the Navy immediately, pending some possible future determination of ownership. The order also prevented the defendant from " ... disclosing the nature or contents of any of said property to anyone other than the Bureau of Ordnance of the Department of the Navy, until the further order of this Court." The Court did not relax this order until the trial of this case in late 1955. Because the defendant had used all his technical knowledge, acquired over his entire career, in the performance of the Mark 6 work, and because he was now prevented from disclosing any such material "until further order of this Court", he was now forced to desist completely from his weapons work and any other research and development work. He even had to turn down consulting work as a result of this Court Order. Later (during the trial) the Government was to say that this was only a temporary order and didn't have any legal significance,

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but the Government tried for some months to use it as a lever, offering to relax it to some extent if the defendant would surrender all property in dispute, and on March 22, 1955 (9 months after the order was signed), Judge Chesnut signed an order granting an exemption from this Order of 16 June 1954 for a few photographs, so it is clear that the District Court meant exactly what it said when it stated that this order was to be in effect "until further order of this Court". During the trial, the Court dismissed the order contemptuously, but that doesn't change the fact that it was used seriously as a means for keeping the defendant's research and development business, and his activity of conceiving new weapons systems, shut off for a year and a half. Defendant's counsel continuously warned him he would be in contempt of court if he attempted to do any research or weapons work.

Upon receipt of the Court Order, the defendant's first problem was to obtain counsel, his previous advisor having been warned away from him by the Navy. He requested a few days extension of time, beyond the 6 days given in the Order, to obtain counsel, but this was refused by the U. S. Attorney. The matter was placed in the hands of the law firm of Cummings, Stanley, Truitt, and Cross. They started to work on the case, but two days before the reply to the "show cause" order was due, this firm stated it would have to withdraw from the case (without giving any rational explanation), but that it would stay with the case for another two days in order to finish preparation of a reply to the order to show cause. Not until another year and one half had passed was the defendant told by an official of this firm that it had been asked to drop out of the case by high Navy officials. The reply to the show-cause order was in the form of a memorandum and an affidavit. The former is to be found at p. 28 of the Record; the latter at p. 59. The former is particularly interesting in its defining of the legal issues.

On 28 June 1954 the defendant discussed this case with the chief counsel of the General Electric Company's Washington office. That man said that the Navy had tried at one time to get access to General Electric's engineering notebooks when access to these documents was not specifically authorized in the contract; General Electric had bluntly rejected the Navy's request, and kept its files inviolate.

The defendant, having had his lawyers pressured out of the case, was now forced to get other counsel quickly. He discussed the possibility with Mr. Volpe of Volpe, Boskey, and Skallerup. Mr. Volpe discussed the matter with the Navy; then told the defendant that the Navy stated that the purpose of the suit was to pressure the defendant into a Navy-sponsored merger. Having had enough of the Navy's giveaway merger plans, the defendant backed away from this possibility. He selected Covington and Burling as his counsel, and the firm assigned a Mr. Edward Howard to handle the case, with a Mr. J. C. McKay acting as his assistant. Mr. Howard discussed the case with Mr. Savage, BuOrd's chief counsel. Mr. Savage felt that the sensible thing to do was to reinstate the Mark 6 program, but pointed out this would have to have ADM Schoeffel's approval, and they would have to wait for several days for this as the Admiral was out of town. Shortly after this the defendant's lawyers and the Navy lawyers had another conversation, and the Navy lawyers asked the defendant to submit a proposal for the reinstatement of the Mark 6 program. Puzzled as to just what was wanted, the defendant approached the new head of ReSd (CDR Calloway) through an intermediary (LCDR Doyle) and asked what sort of a proposal was desired. The defendant also requested a meeting with CDR Calloway to discuss the matter. Several days later he was advised by CDR Calloway, via LCDR Doyle, that ADM Schoeffel had returned from his trip and had issued orders that the Mark 6 program was not to be reinstated. Orders had also been issued to build up a solid case to justify termination. The Mark 6 file was to be retroactively "loaded" with memoranda to justify termination.

ADM Schoeffel had also ordered the Naval Ordnance Laboratory, Corona, and the Naval Ordnance Plant, Indianapolis to prepare "unfavorable" evaluation reports on the Mark 6 system to justify termination. (The defendant learned much later that these two organizations refused to supply the desired unfavorable reports, saying that they didn't have enough information on the Mark 6 to be able to evaluate it completely.) The preparation of the unfavorable evaluation reports was being requested on a "rush" basis, via transcontinental telephone calls. CDR Calloway stated that in the light of ADM Schoeffel's activities, his course was clearly charted for him. Attempts to reinstate the Mark 6 work were broken off.

During the spring and summer of 1954 the staff of the Senate Armed Services

Committee continued its investigation of the Mark 6 situation, and were frequently assisted by the defendant. At one of their meetings on this subject, they suggested to the defendant that he contact ex-Senator Millard E. Tydings, who was now practicing law in Washington, and see whether he could work out some practical means of getting the Mark 6 work moving forward. Hence in September 1954 the defendant met and retained this venerable gentleman, who had had 24 years of experience with the Senate Armed Services Committee. After several meetings with the defendant, Senator Tydings visited Admiral Schoeffel on 13 September. This time ADM Schoeffel stated that the Mark 6 program had been terminated over the defendant's refusal to accept the interim program and that the Navy hadn't been interested in (or attempted to foster) any merger. ADM Schoeffel also stated that the Mark 6 program was being evaluated, and if the reports were favorable, the program would be continued. Sen. Tydings pointed out that if the reports were not favorable, and the program was abandoned, he assumed that the various uncompleted parts of the system would unquestionably become the defendant's property, and ADM Schoeffel agreed.

Senator Tydings decided that the best way to get the Mark 6 program moving would be for the defendant to consider merging with the Fairchild Aircraft and Engine Corp., which he represented. He asked the defendant whether he would consider such a possibility, and he agreed. Sen. Tydings arranged for several meetings between Fairchild representatives and the defendant. The Fairchild representatives eventually became very much interested in a merger with the Jacobs organization, but when two high Fairchild officials went and discussed the possibility with ADM Schoeffel, he exhibited no enthusiasm for the merger and scared the Fairchild officials off. He told them the Navy was now expecting the defendant to complete and perform tests on the major part of the Mark 6 at his own expense. It is interesting to note that when Sen. Tydings first entered this case, he stated that he knew that military officials were often accused of misdeeds in procurement situations, but he had found that the accusations were usually untrue or exaggerated. After several months of investigating and dealing with this situation, he condemned ADM Schoeffel in terms too strong for inclusion in this petition.

During the fall of 1954 the defendant learned that F.B.I. agents were visiting all former employees of the company, and were asking if they knew anything discreditable concerning the defendant that could be used against him. They were saying, in effect, "if you have any grievance to work off against this fellow, give us some dirt; we'll do the rest." The Dept. of Justice was clearly on the job, and apparently wasn't too happy with the prospects of winning the suit on its legal merits.

Early in 1955 ADM F. S. Withington replaced ADM Schoeffel as Chief of BuOrd, and Schoeffel retired shortly afterward, to become employed (at his home) by the General Precision Equipment Co. In January 1955 Sen. Tydings visited BuOrd to discuss the possible resumption of the Mark 6 work with the new Chief, ADM Withington. However, ADM Withington told Sen. Tydings that he had been told that the Mark 6 wouldn't work. He suggested, however, that the defendant merge with a large company. Sen. Tydings pointed out to ADM Withington that he had attempted to foster a Fairchild-Jacobs merger, and Fairchild had been chased off by BuOrd. ADM Withington said he had no further suggestion. On that same day Sen. Tydings advised the defendant that the situation was one in which he felt he could do no further good, and he withdrew.

The Court's restraining order of 16 June 1954 was proving very oppressive to the defendant's company, so early in 1955 the defendant began pushing his lawyers to try to get the whole case heard in Court and resolved. Mr. Howard showed hesitation over bringing the issue of improper termination into court, but was willing to debate the contract issue. This did not satisfy the defendant, who felt the whole case must be heard to give the Court a full picture of the whole situation. He complained to Covington and Burling, and on 17 March 1955 he had a meeting with a Mr. James McGlothlin, a senior official of the firm. He explained his position to Mr. McGlothlin. Mr. McGlothlin stated his firm was willing to push the whole case and stated that Mr. Howard would withdraw and would be replaced by Mr. McKay who stated most firmly that he would push the entire case. The defendant urged that the case be pushed to an immediate trial, but Mr. McGlothlin stated that his firm wanted some assurance of the validity of the defendant's story, and wanted to take some depositions of Navy representatives. The defendant agreed, and the depositions of the following BuOrd representatives were taken: ADM M. F. Schoeffel (former Chief), LT (JG) Kent (former Mark 6 project officer), Mr. Edwin P. Schweitz (former Mark 6 project engineer), and Mrs. Leona Swallen (the contract negotiator on the Mark 6 project). These depositions fully confirmed the defendant's story, and preparations for trial were pushed by Mr.

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McKay and his assistant, Mr. Harold Willcox.

In the spring of 1955 Navy economic pressure against the defendant was very heavy, for the Navy was cutting off the defendant's sales of electronic components to large commercial firms holding military contracts. The defendant asked Mr. McKay, in April, to push for immediate trial, and McKay agreed.

The staff of the Senate Armed Services Committee had been working intensively on an investigation of the Mark 6 program since March of 1954, and the defendant had contributed much time and effort to that investigation, and had had many meetings with them. By June of 1955 they had a pretty clear picture of the Mark 6 situation. On 9 June 1955 they advised the defendant as follows concerning their findings: The Navy at that time was doing nothing with the Mark 6 project except preparing a report. A CNO requirement still existed for the Mark 6 system. BuOrd had let a contract to another company to build a bombing system to meet that requirement, but Navy engineers felt that there was little hope that that substitute system would work. The Senate investigators felt that the Mark 6 system development had been cut off by orders emanating from a powerful company which was afraid of the implications (to its own economic future) of the Mark 6 system. They felt that this company possessed very great political power.

The findings of the Senate investigators were not permitted in evidence during the trial although the defendant argued that these men were certainly agents of the plaintiff. The Senate investigators were all intelligent lawyers, and it is felt that their fifteen months intensive study of the case, which involved examining much data which the Navy concealed from the defendant and the Court for purposes of self-protection and not security, going through files, and examining Navy witnesses (which witnesses the defendant was prevented from bringing into Court) all gave them a far broader view of the whole situation than the Court itself could obtain. As they are agents of the plaintiff it seems reasonable their findings should be given judicial consideration.

It may be noted that when counsel for the defendant visited the Navy on 2 June 1955 to look at its files on the Mark 6, they found the files had been stripped and many pertinent papers had disappeared. Later one of those papers reappeared in a version which showed it had been prepared specially for the trial, and back-dated.

Late in June 1955 settlement discussions were held at the Dept. of Justice. The defendant will not mention the specific terms that were discussed, other than to state that it was apparent that the suit could be quickly and amicably settled out of court if BuOrd was willing to correct its illegal throttling (whose existence was placidly acknowledged by Dept. of Justice officials) of the defendant's weapons development work. The matter was referred to BuOrd for a decision, and rejected. The Justice officials also threatened to stall the case in Court for years and said they would continue their procedure of breaking the defendant financially if he did not surrender immediately. Counsel for the Senate Armed Services Committee stated, when this matter was discussed with them, that the defendant's Constitutional rights were being violated by this high-handed procedure. Exactly three weeks after the meeting at the Dept. of Justice, the defendant's major customer for electronic components (who purchased these components for use on military contracts) took action to block the defendant from bidding on its requirements.

During the summer of 1955 the defendant continued to press for trial of the case, and his lawyers had discussions to this effect with the District Court Judge, the U. S. Attorney, etc. A motion for immediate trial was filed on 4 August 1955, and a hearing was held on this motion on 9 September 1955. As a result of this hearing dates were set for pre-trial hearings, and for the trial itself.

A pre-trial hearing was held on 4 October 1955. The Government was most anxious for the Court to rule that the issue of improper termination could not be raised. The Court ruled that the defendant's counsel should prepare a memorandum (in the form of an Amendment to the original answer to the Complaint) outlining the case on improper termination, and that the whole matter be argued in the form of a hearing on a Government motion to "strike" this defense. At this point in the proceedings the Government demanded access to the defendant's technical files under discovery procedure, and the Court ordered the defendant to permit two BuOrd engineers and one Government lawyer to go through his technical files for three days. The defendant protested that his technical files did not contain material that would shed light on the legal issues, but to no avail.

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The next day (5 October) the defendant was advised that the Navy proposed to attempt to use the Court's grant of authority for discovery to turn two NOPI engineers loose in the defendant's technical files. This was clearly another attempt to gain the fruits of the trial before the trial, and it was an attempt to get an admitted competitor into the defendant's files. The defendant ordered his counsel to resist this attempt vigorously. An appropriate motion was filed and a hearing thereon held on 7 October. The Court stated (defendant has been unable to get a transcript of this proceeding) that if the defendant did not admit NOPI personnel to his plant under discovery procedure, and grant them free access to his technical files, the Court would subpoena all the defendant's technical files and turn them over to the Government for study. Technical files are very difficult to protect -- once an intruder has glanced at them sufficiently to comprehend their contents, they have been violated in effect even though the physical possession of the files is not jeopardized. Hence the protection of files, to prevent the stealing of ideas contained therein, requires that they not be seen, not merely that they not be stolen. Hence due protest was made to the Court, but to no avail. The upshot of this hearing was that the defendant had to admit one NOPI engineer and one BuOrd engineer, as well as one Government lawyer, to his technical files. The U. S. Attorney pledged that these individuals would only list the contents of the files and would make no attempt to acquire their contents by studying the documents. This discovery procedure was set for 17 October.

On 17 October the Navy representatives appeared at the defendant's plant. However soon after they arrived it was discovered by the defendant that, in violation of the pledge of the U. S. Attorney, they proposed to study the defendant's technical files and take notes on their contents. This was clearly still another attempt to gain the fruits of the trial before the trial, and the defendant refused to permit this procedure to take place. After some frantic telephoning, a hearing on this matter in the Judge's chambers was scheduled for that afternoon. Because of the short notice involved, the defendant's counsel, Mr. McKay, could not attend and the defendant went over to Baltimore himself. The matter was argued before the Judge, with the U. S. Attorney arguing that study of the defendant's technical files, and the taking of notes on their contents, was a necessary procedure for the preparation of the Government's case. The Judge finally ruled that the Navy people could go hastily through the defendant's technical files, and could catalogue them but not take specific notes of their contents. The Navy representatives thus returned to the defendant's plant on 18-19 October, and went through some 40,000 documents in the technical files. They listed everything that interested them, without bothering to determine whether it was related to the contract in issue or not.

During the months that had elapsed since Covington and Burling had assigned Messrs. McKay and Willcox to this case, the defendant had had many discussions with them. They always assured him they were going to carry the full case into court. The defendant, knowing that Covington and Burling had business relations with some of the firms that might be mentioned unfavorably during the presentation of the termination defence, queried Mr. McKay on at least three occasions as to whether his firm would permit him to present this defence in Court. McKay referred the matter to his superiors, and thereafter advised the defendant that his firm would carry the case through completely, honestly, and vigorously.

On 18 October the defendant's counsel filed the outline of the termination defence, as requested by the Court, in the form of a "Second Amendment to Answer". The next day the Government filed a motion to strike this defence, and a hearing on this motion was held on 21 October. The defendant has not been able to get a transcript of this hearing, but according to his notes, the U. S. Attorney argued very vigorously against the admission of the termination defence, claiming that even if the termination were arbitrary or fraudulent it should not affect the question of access to the defendant's files. The Court held that such access involved a question of equity, and could not be granted if the Government had acted improperly. The U. S. Attorney raised the question of an asserted public need for access to defendant's files, and the Court remarked that this consideration lined everyone in the United States against the defendant, but that issues of right and wrong were still important. The U. S. Attorney next tried to get the termination defence ruled out on the issue of "state secrets", but the Court contended that the case had been brought into Court by the Government, and it could hardly expect to have possible improper actions excluded as state secrets. Next the U. S. Attorney argued that the principle of the separation of powers would prevent the Court from sitting in judgment on a question of the propriety of actions of the

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Executive Branch, but 41 U.S.C. 321 met this argument. The Court ruled that the termination defence would be presented, and that after its presentation the Court would rule whether the defence would be struck, and whether a rebuttal case would be presented by the Government. (When the case came to trial, however, the Government presented a lot of its rebuttal case along with its direct case.) Also on 21 October the question of the Court's jurisdiction over the counterclaims was argued at considerable length. A decision on this point was reserved.

On 22 October the defendant reviewed some of the transcripts of conversations which the Government was preparing to use in its case, and compared these with accurate transcripts. He found that the Government transcripts had been altered greatly, and so advised Mr. McKay. He urged Mr. McKay to summon certain Navy personnel, particularly ADM Schoeffel, as witnesses, but McKay refused. However, McKay and his assistant Willcox were much interested in the inaccurate Government documents, and, after studying them, asserted they would make very useful exhibits in the case. They stated these documents clearly proved fraud. (They did not introduce them during the trial, and Mr. Willcox asserted during the trial that he would withdraw if the defendant insisted on their use.)

On 7 November Mr. McKay told the defendant that his firm was interested in carrying some of the issues between the defendant and the Navy into the Court of Claims. He also stated that he had discussed this case with a partner of Covington and Burling, Mr. E. McElwain, and had been told that Covington and Burling knew of a wide range of most improper activities of certain of the Navy people who were prominent in this case, and that their activities received protection at a very high level.

The case finally came to trial on 16 November 1955. This brief will not attempt to cover the long and tortuous course of the testimony. The transcript, even though it has been tampered with, gives a general idea as to the course of the proceedings. On the first day the Government produced its story as to why it terminated the contract. This was already been reviewed previously. The Court ordered all testimony transcribed (the Transcript has been altered on this point) for its study. Actually, only the testimony of the key Government witness, Mr. Schweitz, was transcribed and turned over to the Court. The second day of the trial was 17 November, and on this day the Court stated twice that it was going to give the Government everything it wanted unless the termination defence was found to be acceptable.

It is to be noted at this point that Messrs. McKay and Willcox kept in close touch with their office, having long telephone conversations with it during recesses, during the entire time they represented the defendant, although they later declared that they received no instructions from their superiors. This point subsequently became an important issue when the defendant later claimed that they were not representing him solely, but were taking orders from superiors and hence breached the personal relationship between counsel and client.

On 18 November 1955, the day following the second day of the trial, Mr. Harold Willcox of Covington and Burling visited the defendant's plant, arriving about noon. He said that he and Mr. McKay had had a long conference that morning with Mr. J. McClothlin, a senior partner of Covington and Burling, and that Mr. McClothlin had issued instructions that the defence in the case was to be completely changed from what had been planned up to that point. The new defence proposed by Mr. McClothlin was to revolve about the contract issue alone, and after that issue was fought out in Court a continuance was to be requested, and during this a memorandum on the contract points was to be prepared, and if that did not win, the termination defence was to be presented. The contract defence was to be termed a "first defence", and the termination defence was to be called a "second defence". The defendant protested strongly against this course of action, arguing that the Court had stated clearly already that it was going to give everything to the Government unless the termination defence was presented effectively. The defendant also pointed out that the Government had anticipated the termination defence and had made a vigorous attack on the defendant that had been given widespread publicity, and that he had to defend himself or he would be greatly harmed professionally. He also pointed to the promises that had been made him by Covington and Burling, and the large amount of time and money he had expended in preparing the termination defence. To these arguments Mr. Willcox kept replying that he had his instructions from Mr. McClothlin, and he could not change those instructions. He stated that Covington and Burling would withdraw from the case at that time if the defendant did not agree to the proposed course of action. After further argument, Mr. Willcox agreed not to ask for a continuance if the con-

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tract defence failed to win, and promised most solemnly that the termination defence would be immediately presented in that event. The defendant was carried along with this course of action because he did not wish to be faced with the prospect of getting other counsel in the middle of a trial on which his career and the fortunes of his company depended.

The trial reopened on 21 November. The Court was advised of the splitting of the defence into two parts. On this day occurred an event which, though relatively minor, serves to illustrate very clearly the tactics employed by the Government in this trial. The Government placed in evidence a list (Gov. Ex. 34) of some items which, it claimed, had been omitted by the defendant from the inventory schedules prepared by his company. The implication which the Government sought to present was that the defendant had purchased some costly equipment, had been reimbursed for same by the Government, and was now trying to retain possession, but had been detected by vigilant Government agents. The chief item was an Ozalid blueprint machine worth $1650. The Court immediately spotted this item on the list. A little questioning, however, brought forth the reluctant admission from a Government witness (who had prepared the list) that the Government knew that the item (and others on the list) had never been purchased by the defendant's company and hence could hardly have appeared on his inventory schedules (Transcript, p. 268-269). The Government was clearly using this extremely questionable means of trying to place the defendant in a bad light before the Court and on the record. The Court merely remarked dryly, to the witness, "You seem to have hit on a wrong item." There was no censuring of the Government, however. The Government witness later remarked bitterly to an employee of the defendant, "Oh, I wish the Judge hadn't spotted that Ozalid machine."

The fourth day of the trial was 22 November, and the fifth day was 28 November. Up to this point the Government had been making various allegations about the defendant, and he had been kept muzzled by his lawyers. The Court became extremely irritated at the defendant and stated he had practically committed a fraud on the Government by signing such a contract without intending to turn all his files over to the Government. Later that day the Court launched into another virulent attack on the defendant, and Mr. McKay remarked that he felt the defendant had been badly treated by the Navy. The Court replied (Transcript, p. 637), "I just can't believe that the Navy -- I cannot believe that some important person in the Navy might be, act so improperly." This remark was made before the termination defence was presented, and it seems a somewhat biased attitude for a Court to hold before any evidence for the defence on this point had been presented. It is nice to believe that no Government official ever acts improperly, but such a conclusion is clearly inconsistent with the bitter facts of history.

When the sixth day of the trial (30 November 1955) started, the Court continued its remarks about the defendant. For example: "Mr. Jacobs didn't want to continue the program, the interim program, whatever it was. He didn't ask to continue it. I have no recollection of any testimony where he said 'Let's continue.'" A little later the Court decided (p. 663 of the Transcript) that the suit was an equity case, and hence the counterclaims were relevant, and it should hear the termination defence. On this point the Court remarked, "I think it is very unfortunate to Mr. Jacobs that he feels it is necessary to press it, but if he wants to press it I don't see how I can give the Government equitable relief without hearing the equity." At about the middle of the morning session, the Court held a whispered conference with counsel. After this Messrs. McKay and Willcox held a whispered conference between themselves (during a short recess which had been called), then approached the defendant and told him that the Court had stated that it did not wish to hear the termination defence, and that if this defence were introduced the Court would have to write an opinion very critical of the defendant. The Court was also quoted as indicating that the defendant would be treated fairly on the counterclaims only if he withdrew the termination defence. Specifically, Mr. Willcox stated the Court would "crucify" the defendant in the decree (See Affidavit of W. M. Winkelman, Record, p. 242ff). The lawyers urged that the defendant withdraw this defence. During the lunch recess the defendant discussed this matter with his lawyers. They said that their superior in their firm felt that this defence should not be presented. The defendant urged strongly that it be put in, but questioned the changed attitude of the lawyers, pointing out that they had promised him that it would be presented. At this suggestion Mr. Willcox flared up (or appeared to flare up) and snarled that if the defendant couldn't trust his lawyers, they would withdraw from the case at this point and ask the Court for a continuance so he could obtain other counsel. Without waiting for a reply from the defendant, Mr. Willcox strode off, with Mr. McKay trailing wordlessly in his wake.

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SECTION III -- FACTS

The defendant was left literally speechless with amazement.

Mr. McKay's account of this situation can be found on p. 8 of the Transcript of 9 December 1955, where he tells the Court, " *** I said, 'We cannot represent you, if you have these feelings toward us.' We approached the bench, and I stated: 'Under the circumstances, I will have to withdraw, and time is of the essence.' And your Honor interrupted me and said, 'I cannot let you withdraw.'" That is Mr. McKay's story, and it substantially confirms what happened. The question of the significance of this act on the part of the defendant's lawyers is of great importance. In the eyes of the defendant, he was deserted by his counsel at this point. The Court saw it differently. When the defendant later reviewed the above events, at a hearing on a motion for a new trial (Transcript, p. 1154), he concluded, " *** but there you have the de facto matter that they said they were pulling out, and they walked off and left me." whereupon the Court replied: "They didn't walk off and leave you, Mr. Jacobs. There is no use making a flat statement which is not true." Apparently the Court found it convenient not to believe either the defendant or Mr. McKay on this point.

Anyway, whether the Court chose to believe it or not, the lawyers walked off and left the defendant, and had a whispered conference with the Judge. Then the Court summoned the defendant to the bench and stated that McKay and Willcox had asked permission to withdraw from the case, and the Court was denying their request. The Court asked the defendant if he wanted his lawyers to present his termination defence, and the defendant said he did not wish this defence presented by lawyers who did not feel that it should be presented, for they could easily chop it up (by asking questions in improper sequence, etc.) and he wanted other counsel. The Court pressed the defendant for a decision as to whether he wanted the second defence presented by his present lawyers, who were forbidden to withdraw, and the defendant requested permission to delay the decision until later in the day. Near the end of the session the Court inquired of the defendant as to his decision as to whether he wanted his termination defence presented by McKay and Willcox, or not at all. He requested permission to reserve a decision until the following morning, and this was granted.

The problem that faced the defendant that night was a thorny one: whether to permit his termination defence to be presented by lawyers who had broken their word to him, and who had withdrawn from his service rather than present his defence, and who were now in his service against his volition and theirs, or not to present it under these circumstances. Neither possibility had any merit or fairness to it. But the decision had to be made. The defendant decided that the best course was to prevent these lawyers from presenting histermination defence; then discharge them as soon as the trial was over and as soon as the Court's order that they could not get out of the case presumably became ineffective. This may not have been logical legal thinking, but it is the course of the defendant's thoughts. Perhaps there were other alternatives that a lawyer would have seen, but the defendant was not a lawyer, and at this point he did not have access to a lawyer who could advise him on this point. So, when the question was raised in Court the next day (1 December) as to whether the termination defence was to be presented under the existing circumstances, the defendant decided against it.

Not having to face the question of the propriety of its actions, the Government immediately introduced new claims against the defendant, one being a tort claim for conversion of property and the other being a demand for a reduction in the fixed fee paid the defendant for his work under the contract. The Court was not sympathetic to these claims, saying with regard to the latter (Transcript, p. 778), "How the uncontradicted evidence is that he used the best efforts and they were good indeed, to do what was done."

The counterclaim issue was given very brief and cursory consideration, and then the Court handed down its decision of 1 December 1955 (Appendix 1 hereto), finding against the defendant on all major issues, and awarding him approximately one-third of his counterclaims. On 2 December the defendant thought over this turn of events and took no action. On the next day (3 December) he discussed the amazing actions of his lawyers in walking off and leaving him in Court with an official of the firm which had handled his case immediately after the order-to-show-cause was issued. That man then advised the defendant that his firm had been forced to withdraw from the case under Navy pressure. The defendant remarked that he supposed this pressure was applied through some of the firm's big-business clients, but was told that this was not the case -- the pressure was applied directly by high Navy officials who requested that the firm withdraw from the case forthwith. This was a new and parti-

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cularly shocking revelation. On this same morning the defendant wrote a letter to the Judge (Record, p. 196) stating in part, "In Court you denied the motion for a continuance so that I could obtain other counsel in place of my own lawyers who had suddenly refused to push my defence vigorously except under your orders. I again request that I be permitted the opportunity to seek other counsel, for it seems to me that on a matter as vital to the nation and to me as this, I am entitled as a matter of justice to my day in court. Should you feel that this is not fair, I beg to be permitted to present my case myself, forthwith." The Judge replied, in a letter dated 5 December 1955, " *** I have arranged a conference in this matter for Friday afternoon, at 2:00 P. M., in my chambers. *** "

On 5 December the defendant discussed the trial with two lawyers of the Senate Armed Services Committee, who remarked that if the defendant couldn't get justice in a Federal District Court, he might just as well shut down his company and take a job with General Precision.

On 6 December, just to make sure that there was no longer any question of him being represented by Covington and Burling, he wrote them as follows:

> "During the trial in the case of U. S. vs. The Jacobs Instrument Company, you withdrew from participation in the case. You were subsequently ordered by Judge Thomsen to continue your representation of me against your volition and mine.
>
> "Now that the trial has concluded I wish it to be distinctly understood that you do not represent me, and I direct that you make no commitments or agreements in my name."

The Court had ruled on 1 December that the defendant could keep his technical files, but would have to permit the Navy to copy these files. This did not satisfy the Navy, and on 8 December the defendant was visited by a Navy security officer who urged the defendant to turn his technical files over to the Navy, and said if he did not comply, the Navy would force him to retain guards for the documents for the rest of his life.

On 9 December the defendant went over to Baltimore, naively expecting a conference in the Judge's chambers as promised in the Judge's letter of 5 December. He found the Judge's chambers locked, and waited in the corridor outside the door. The Judge's bailiff came along and explained that the Judge was still in Court, and would be a little late for his appointment, and suggested that the defendant wait in Court until the Judge was through in there. Unsuspectingly, the defendant went into the courtroom and seated himself. In a few minutes, and to his utter surprise and horror, his case was called for a formal hearing, and he was invited inside the rail by the Court to defend himself. To his amazement he found himself opposed by two U. S. Attorneys and three Covington and Burling lawyers. As this was the first time he had ever stood on the floor of a courtroom, and as this had to be done spontaneously and without the slightest warning or preparation, it was indeed a horrifying experience. The question of the defendant's representation by counsel was discussed (see Transcript) and the defendant again asked for time to get counsel, and said that if this was not satisfactory to the Court, he would be willing to put his defence on himself if he could be given time to prepare it. The Court took the position that if the defendant were permitted counsel, the question of the admissability of the termination defence (which had been argued thoroughly in Court on 21 October, and ruled on) would have to be reopened and argued again, and this should be done "within the next couple of weeks". The defendant felt that it would take more than this amount of time to acquaint a new counsel with this complex case, and he further felt that it would be a serious gamble of time and money if the Court would only permit a new counsel to argue the admissability of the termination defence. He pointed this out to the Court and offered to present the case himself if this was the most the Court would allow him. The Court also pointed out that the defendant would have to make satisfactory arrangements with Covington and Burling before he could retain other counsel. He asked for permission to bring in several witnesses, but the Judge frowned and shook his head, and the defendant finally hesitatingly asked if he could present his defence himself. The Court quickly acceded to this and ordered the defendant to be ready to present his defence by Monday morning (this was late on a Friday afternoon and would allow only two days for the complete outlining of the defence, the selection and photostating of documents, etc.). The photostating problem was particularly difficult because such facilities are usually closed on weekends.

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At this hearing on 9 December the Court also made some rulings on the issues of the case. It ruled that all physical property (excluding documents) must be turned over immediately to the Government by the defendant, although the defendant asked the Court to reserve a ruling on this until the termination defence was heard. The Court also ruled that the Government could copy the defendant's documents, and turn them over to the Court. The defendant protested against this course of action, but to no avail.

After the close of the 9 December 1955 hearing, the defendant encountered Mr. McGlothlin of Covington and Burling outside the courtroom. Mr. McGlothlin remarked that he assumed that the defendant wanted the depositions and other documents in the case for the preparation of his termination defence, and offered to turn them over to the defendant if the defendant paid a large sum (over $6600) immediately to Covington and Burling, this to be in addition to the large sums already paid that firm. The defendant refused. The defendant requested of the Judge that the Court's copies of the depositions be loaned to him for two days, but this request was refused although the Court did arrange for the defendant to borrow the U. S. Attorney's copies of these documents for this period.

The defendant thus had to present his termination defence after the Court had ruled on the case, and without counsel, and without witnesses, and without the bulk of the documents necessary for preparation, and with only two days to prepare the case. Whether this represents "due process" remains to be determined.

The defendant presented his termination defence on 12, 13, and 14 December, and the Court handed down its decision on this defence (Def. App. 3) on 14 December. The Court concluded that while there had been improper activity on the part of some Navy personnel, there had not been a showing that the contract had not been terminated properly.

The physical property was turned out of the defendant's office by the Marshal in accordance with the Court's decree, and the defendant's technical files were microfilmed and these microfilms were turned over to the Court. They still remain in the Court's possession, pending the outcome of appeals taken by both the plaintiff and the defendant.

The defendant made a number of unsuccessful attempts to obtain counsel. One lawyer remarked, "You had a good case and Covington and Burling got you into a mess, and you can't expect me to get you out." Another became sufficiently interested in the case to journey over to Baltimore to look at the case file. He was invited into the Judge's chambers by the Judge and was told that there was no point in carrying the case further as the defendant had had a fair trial and the matter was closed. The lawyer thereupon decided not to proceed further. It became evident that the defendant would have to represent himself, much as he felt this was an undesirable course of action.

The defendant made a number of attempts to get an appointment with a Covington and Burling official so he could get some explanation of their strange actions during the trial. All he got was evasions. On 25 January 1956 he filed a motion for a new trial based on (1) the question of proper representation by counsel, and (2) the use of highly inaccurate documents as exhibits in the case by the Government (Record, p. 210). This motion reviewed the facts quite thoroughly.

On 27 January 1956 the defendant finally obtained the long-sought interview with Covington and Burling, and conferred with two of its officials: Mr. Newell Ellison, who appeared to be the administrative head of the firm, and Mr. J. McGlothlin, who was the superior of Messrs. McKay and Willcox. Both are partners in the firm. Mr. McGlothlin stated that Messrs. McKay and Willcox had withdrawn from the case because the defendant had accused them of selling him out. The defendant denied strongly that he had made such an accusation (affidavits subsequently filed by Messrs. McKay and Willcox appear to support the defendant in this). Mr. McGlothlin further stated that a decision had been made to split the defence into two parts on 18 November 1955 because of some documents the Gov't had turned over to Covington and Burling. The conference ended inconclusively.

After that conference the defendant began to ponder over what he had learned from Mr. McGlothlin. The defence had been split, and the case wrecked, because of some documents that had been handed by the Gov't to Covington and Burling. What documents were these? The more the defendant thought about it, the more puzzled he became. He didn't know of any such documents. They must be serious indeed, he speculated, to

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cause his lawyers to wreck his case and walk out on him. But what could they be? It began to look as if he had been tried and found guilty of some nameless crime, on the accusations of some faceless accusers, by his lawyers, in a trial held without the presence of the Judge. The whole situation looked bad, indeed. The defendant concluded that if he was being accused of something, he had better get the whole matter out into the open. He accordingly filed a supplement to his motion for a new trial with the Court Clerk on 30 January 1956. In this he set forth the additional facts he had obtained from Mr. McGlothlin, and the inferences that could be drawn from them (This supplement was subsequently found by the defendant to be missing from the case file, and it was only after a long argument with the Court Clerk and an appeal to the Judge that it was transmitted to the Court of Appeals. It will be found buried in the back of the Transcript as Volume 14).

On 1 February 1956 the defendant wrote a letter to the Court requesting it to order the U. S. Attorney to turn copies of these mysterious documents over to the defendant. A copy of this letter was sent to the U. S. Attorney, who transmitted copies of these documents to the defendant. Upon examination, these documents turned out to be copies of proposed Government exhibits for its rebuttal case, and were essentially all internal Government letters and memoranda. During the early days of the trial the defendant had been told by his counsel that such documents had been received, but they had refused requests of the defendant to be permitted to view these documents. A quick study of these documents upon their receipt from the U. S. Attorney gave the defendant another jolt. They clearly added a large measure of proof to the defendant's termination defence, and would have been extremely useful in its presentation. And there is no doubt that the defendant's lawyers were sufficiently well acquainted with the case to have realized this. Why they were concealed by them from the defendant, and why they were claimed to be the basis for wrecking the case, are unknown at this point. These documents were used in the preparation of this brief, and several are included herewith as Appendices.

As soon as the defendant had analyzed these documents, he prepared and filed a second supplement to his motion for a new trial. This supplement broadened the grounds on which a new trial was requested by adding to the two original bases a third one: Discovery of vitally important new evidence. The supplement, 7 pages in length, analyzed these documents and indicated their significance to the issues of

third one: Discovery of vitally important new evidence. The supplement, 7 pages in length, analyzed these documents and indicated their significance to the issues of the case. This supplement, too, was not found in the case file by the defendant at a later date, and was only forwarded to the Court of Appeals after much argument. It can be found buried at the end of the Transcript, as Vol. 15 thereof.

On 9 February 1956 a hearing on the defendant's motion for a new trial was held. This resolved itself into a vigorous debate between the defendant and the Court, with the U. S. Attorney playing a minor role in the proceedings. On the question of the defendant having been adequately represented by counsel, and being deserted in Court, the Court commented, "I don't understand that Covington and Burling withdrew from the case." When the defendant asserted, " *** but there you have the de facto matter that they said they were pulling out, and they walked off and left me.", the Court replied, "They didn't walk off and leave you, Mr. Jacobs. There is no use making a flat statement which is not true." Just what the Court had in mind in making this assertion is not clear, for it is not in congruence with the testimony of either the defendant, or Covington and Burling, nor is it in accordance with the affidavits filed by the defendant and his lawyers.

On the question of whether the Government documents that had been challenged by the defendant were, in fact, false, the defendant put in evidence a document (a transcript of a telephone conversation) which showed that a Government transcript of the same conversation, which had been introduced in evidence, was highly inaccurate, and inaccurate in the Government's interest. The Court Clerk's entry on the Government version reads: "16. Transcript of recording of telephone conversation between Jacobs and O'Brien of Ordnance - 7/22/53". A comparison of the correct and Government versions showed that much had been deleted from the latter, and what remained was highly inaccurate. For example the Government version, purportedly a verbatim transcript of the conversation, put the following words in the defendant's mouth concerning technical documents, "I think the Government is, of course, entitled to this information but am naturally concerned with any patent rights which I might have in the matter." What was actually said was, "Well I guess my position is that I am trying to find out where I stand relative to transmitting that information to the Government. Personally I have no objection to transmitting the information whatever. I am just trying to find out what legal effects such transmittal might have on such patent

rights." Now, there is a big difference between these two statements, as any lawyer should be willing to admit. This excerpt is taken from the beginning of the transcript, and from here on the two versions become more highly divergent. The Court admitted that "anyone" looking at the Government version "would think it was a transcript", but then implied that the Court instinctively knew that it was really an edited version. The Court admitted "Certainly there is a difference between your saying you do not object to them having it and saying that they are entitled to it." The Court insisted that incorrect documents are used by the Government all the time, and because it is so common, one can't properly object to the practice. (This seems like a most extraordinary legal doctrine.) The defendant's reply to this attitude of the Court was, "It seems to me that if that is the Government practice, if we have some stenographer's version of the conversation offered in evidence by the Government with the knowledge that this stenographer cut things down, copied things down improperly, abbreviated material, then it seems to me that there is a very big question arising as to whether such material should be accepted in evidence by the Court. I am stunned to find that the Court feels, well, yes, it is inaccurate, but all Government transcripts are inaccurate." The Court then maintained that one had to prove that there was dishonest motivation on the part of the Government employee who tampered with the transcript. The defendant pointed out that the document was offered in evidence as a verbatim transcript and added, "Now, there is nothing here to indicate that this is offered as a summary. The implication is that it is complete and correct." The Court replied, "Well, I agree with you on that, but I did not take it as anything except a summary *** ".

The foregoing paragraph is quite representative of the whole of the hearing, with all points raised by the defendant being airily dismissed with an Alice-in-Wonderland type of logic, when they weren't dismissed with judicial authority or vituperation.

One interesting exchange which revealed the Court's general point of view occurred during this hearing. The defendant was able to prove, with the new evidence he had received since the trial, that there were major efforts on the part of the Navy to force him into a giveaway merger immediately prior to termination. The Court in reply condemned the defendant as being "utterly intransigent" in refusing to give his company away, and added that this confirmed his opinion that the Government was justified in terminating the contract! The Court then exhorted the defendant to merge with a big company. The Court also stated that this was desirable because the defendant's company was not managed properly. The defendant offered to supply evidence which would show whether or not his company had been properly managed and also stated "Certainly if it is a question of business management, it is not a question of opinion -- it is a question of fact." The Court replied, "Oh, no, no, of course not. Business management is a question of opinion. Obviously it is not a question of fact." The Court was obviously fearful of having to form a judgment of this matter on the basis of the available facts. The defendant had offered to supply Dun and Bradstreet analyses of his operations, etc., but the Court found this distasteful.

When the defendant pointed out that certain Government testimony was not in accordance with the provable facts, the Court used various defences. At one point the Court argued that this wasn't a perjury case and if perjury had been committed it should be taken up with the U. S. Attorney. In other cases the Court simply refused to take seriously the proof offered by the defendant. The entire proceeding moved at this level of debate, with the Court shifting back and forth between logic, abuse, and use of judicial authority to shout down the defendant. The transcript of this hearing is far from accurate, but it gives a general idea of the course of the proceedings. Some of the Court's remarks have been deleted and altered, as have some of those of the defendant. The defendant pointed out that the Court records showed that the Navy had been recording his telephone conversations without his consent, and there was a short exchange between the defendant the the U. S. Attorney over this which has disappeared from the transcript.

At this hearing the defendant put in evidence a number of documents, including a transcript of the decisive Schreitz-Jacobs telephone conversation of 24 June 1953. This latter document proved the Government's testimony was false.

At the end of this hearing the Court denied the defendant a new trial (Appendix 5 hereto) and confirmed this on 10 February 1956 with a Court Order (Appendix 6).

On 16 February 1956 the defendant filed a Notice of Appeal, and a similar notice was filed by the plaintiff on 27 February 1956. In late February and early March the defendant was descended upon by a horde of tax agents, both Federal and State, who

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threatened to cause all sorts of fantastic trouble for him. At least one of these hinted that this trouble would cease if the defendant would not appeal. Two cases have resulted from these threats.

The defendant's next job was to try to get a transcript* of the Court proceedings for use in his appeal. This sounds easy, but it wasn't. He called the Court Clerk's office several times and discussed the possibility of ordering a transcript. He was told that the Court Reporter was ill and couldn't prepare this material. The defendant visited the Court Clerk's office on 10 April, and was again told that the Court Reporter was ill and the transcript couldn't be ordered yet. The defendant discussed this matter with Judge Thomsen and asked his assistance, but was referred by him to the U. S. Attorney. The U. S. Attorney referred the defendant to the Dept. of Justice, which he contacted. The chief of that Department's Appellate Section advised the defendant by letter on 18 April that the transcript would be ready "within two weeks". On 1 May 1956 the defendant wrote a letter to the Court Reporter ordering a copy of the complete transcript. It may be noted that an appreciable portion of the transcript, namely the part covering the testimony of the Government's key witness, had been in the hands of the Government since November 1955, and was used by the Government during the trial. But the defendant was unable to get even that portion of the transcript. On 16 May the defendant forwarded an advance payment for the transcript, and on 24 May the defendant again made the long journey over to Baltimore and visited the Court Reporter. He asked about the transcript and was told it was not ready yet, but it would be in his hands "next week". On 5 June the defendant called the Court Reporter and asked about the transcript, which had not been received. He could get no information. Another long distance call to the Court Reporter the next day resulted in a promise that the part of the transcript covering the Schweitz testimony (i. e., the part the Government had had since November 1955) would be sent immediately to the defendant, but there would be some delay over the rest.

The defendant received the first two volumes of the transcript (out of a total of twelve volumes) on 7 June, and the third volume on 9 June. A hasty study of the transcript showed material errors in it, and he therefore sent a petition to the Court on 11 June requesting that this matter be straightened out. The Judge replied by letter on 13 June, offering to hold a hearing on the matter "before the end of June". However, the defendant did not receive the rest of the transcript until 22 June, and this did not give him sufficient time to analyze this material (1266 pages) and prepare for a hearing thereon. Moreover, the Judge's letter had concluded, "I suggest that you confine yourself to material points and not to trifling differences between your recollection and the transcript". The hearing on the defendant's motion for a new trial had demonstrated amply that major differences existed between what the Court considered trifling matters, and what the defendant considered as unimportant. In view of this unpromising atmosphere, the defendant decided to abandon his attempts at getting a reasonably accurate transcript, and decided not to use it in the trial, nor deposit it with the Court Clerk. He had already been advised by the Dept. of Justice (3 May) that their appeal "will require reference only to a small portion of the trial testimony". He was therefore surprised to learn in July 1956 that a fairly complete transcript had been deposited with the Court Clerk, and transmitted by him to the Court of Appeals "pursuant to the Designation of the Appellant" (the Appellant being, of course, the original defendant).

The Government's original intention, as expressed by the U. S. Attorney to the defendant on 10 April, had been to put the entire transcript in evidence. Obviously the thing had to be used after the elaborate doctoring it had undergone. But the Government appears to have chosen to deposit this document under the defendant's name rather than its own, possibly to imply that the defendant somehow associated himself with or approved of this interesting mixture of fact and fiction.

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* It is particularly to be noted that the official court reporters were barred from recording the trial testimony, and that this was recorded by a firm brought in from Washington. That firm worked in collaboration with the Department of Justice in preparing the transcript. A very interesting comparison between the transcripts prepared for the Court, and for the Department of Justice, can be made by comparing the last two paragraphs on p. 116 of the Government's Appendix with the 6th to 10th paragraphs inclusive, of the Defendant's Appendix.** The material in the Defendant's Appendix is the official version certified by the Court Reporter. The Justice Department's version is the correct one, which apparently appeared by accident.

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SECTION IV

Basis of Original Jurisdiction

This suit was originated by the United States under 28 U.S.C. 1345, by reason of the United States being the plaintiff.

SECTION V

Argument

(1) Are technical data to be considered as property, subject to protection under the principles established for the protection of property in the Fourth and Fifth Amendments to the U. S. Constitution?

This proved to be one of the most difficult points on which to convince the District Court judge, who maintained that technical data should not be considered as property, until the defendant brought to his attention an article dealing with this subject written by Robert E. Beach, counsel of the United Aircraft Corp., in the 7 November 1955 issue of "Aviation Week" magazine, p. 21. This encouraged the judge to do a little legal research on his own, and he found an article by the same author on the same subject in the November 1955 issue of the American Bar Association Journal, entitled "The Question of Property Rights in Government and Industrial Know-How".

The Attorney-General of the U. S. has recently pointed out, in a Report to the President, dated 9 November 1956, on the Defense Production Act, that:

> ""Technical Information", the resultant of research and development activity, is one of the "materials" (Sec. 702 (b)) which the Act authorizes to be purchased in aid of the defense effort (Sec. 303) and to be allocated where shortages make it necessary to do so (Sec. 101 (a)). "Development of technological processes" is an appropriate object for the exercise of the incentive loan authority conferred under the Act (Sec. 302)."

The Attorney-General's report thus indicates that not only are technical data to be considered to have full status as property, but that there exists legislative authority for so viewing it.

The fact remains, however, that the Supreme Court does not yet appear to have ruled on this issue, and the action taken in this case indicates that the courts below have acted as if this type of material is not property, and is not subject to protection under the standard concept of property rights. The District Court judge called property rights in technical data "very tenuous" (Def. App., p. 81), and the Court of Appeals sweepingly asserted "Furthermore, it is clear that, without regard

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to the contract, the government is entitled to the benefit of all knowledge gained by the contractor in the course of the research for which the government was paying him.", which appears to negate the concept of property rights in technical data.

It is the position of the petitioner that it is meaningless to talk of "very tenuous" property rights; either technical data <u>are</u> property with a legal status equal to that of other types of property, or they <u>are not</u> property at all. This question, it would appear, should now be resolved. Once this is done it becomes possible to go on to the next question, which is the determination of the ownership of the technical data in dispute.

While the legal status of technical data, per se, has only recently become an important issue, the importance of protecting recorded material against unwarranted search, seizure, and use is an old but bitterly disputed issue. The issue was definitively resolved at one time by the writers of the Bill of Rights, for the Fourth Amendment to the U. S. Constitution states "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . .". We appear to have retreated a long way from the principles for which the American Revolution was fought, and perhaps it is now time to re-assert and revive some of the almost-forgotten principles of the Constitution.

If it is decided that technical data <u>are</u> property, in which property rights are vested; then the question as to whether such property can be casually seized and distributed becomes of great importance. If one were to suggest that other forms of property, such as land or buildings or money, could be casually seized by the Government (without any legal or equitable right thereto), and generously handed out by it to favored individuals and concerns, there would be a most tremendous outcry, for it would be clearly seen that such action would immediately destroy our economic and political system. That such action is equally outrageous with respect to technical data is less obvious, if only for the reason that only a very small segment of the population has the fruits of a lifetime of labor tied up in this form of property. Nevertheless, this small segment of the population would seem to be as much entitled to protection of its property as any other segment. In addition, this small segment of the population is a quite useful one in an era of technological warfare, and to assert that it has no property rights in the fruits of its labors is obviously going to have long-term, far-reaching results which are distinctly not in the public interest.

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(2) Can the information in the technical data and engineering drawing files of a government contractor be seized by the Navy for its own use, and for the use of favored commercial organizations, without the existence of any legal or equitable reason for such action, and in spite of specific covenants that there would be no attempt to acquire this material?

The provisions of the instant contract which relate to the disclosure of technical data have been quoted, supra. The Contractor's obligations during the course of the contract work are defined by Article 17(a) -- it appears to be generally agreed that the Contractor discharged such obligations to the satisfaction of all concerned. With regard to post-termination obligations, which are defined in Article 17(b), the Contractor was obligated to write a final report. As the correspondence reproduced on pp. 104-106 of the Defendant's Appendix unequivocally indicates, the Contractor was obligated to write a final report; he offered the Navy its choice of reports of three different lengths, with or without accompanying drawings; the Navy chose the shortest of the three without drawings; the Contractor inquired whether this report would discharge him of his obligations under Article 17(b); the Navy formally assured him it would. On the basis of this formal assurance the Contractor worked for the Navy for a period of 8 months, writing a report and performing various other tasks assigned by the Navy, and did all this without a cent of fee, merely to discharge completely his post-termination obligations. As a matter of fact, he has not even been reimbursed fully for the costs of that work (as had been guaranteed by his contract); they form the basis of some of the counterclaims whose payment the Navy is resisting so vigorously, although it has stipulated the money is due and owing. The final report was turned over to the Navy and was accepted (Gov. App., p. 29).

It is the position of the defendant that the Government has no legal right whatever to the contents of his technical data files, and that the contract is clear and specific on this point.

Although the Government's complaint was based on its interpretation of the contract, the District Court decided, during the trial, that there was no legal basis for the relief demanded by the Government, and the Court then declared the suit to be one in equity. The general philosophy of this approach, which was advanced by the Court on behalf of the Government (acting as its agent), was that the Government had "paid" for the work performed by the Contractor and therefore was entitled on equitable grounds

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to the fruits of the work. It is true that the defendant was promised reimbursement for certain costs incurred during the performance of the work under the contract (but not for all costs), but these reimburseable costs were paid under the provisions of Article 5, which states specifically

> "(a) The Government shall pay to the Contractor as full compensation for the performance of this contract:
>
> (1) The fixed fee, if any, specified in Schedule A; and
>
> (2) The Allowable Costs of the performance of this contract. . ."

This excerpt makes very clear that the costs of performance were paid to the Contractor (or, at least, would have been had the Government kept its end of the bargain) as compensation for his efforts in performing the task allocated by the contract -- the Government was purchasing the work specified in the Task Statement, and had no right whatever to the fruits of the compensation paid the contractor.

It is to be noted that the District Court's decrees give the Government, under the decree of 13 December 1955, the right of access to

> "the defendant's plant at Bethesda, Maryland, and to any and all rooms, lockers, cabinets, safes, files, drawers, and any other spaces or containers located or existing at said plant; (d) that said right of the United States and the Bureau of Ordnance to disclosure and access shall include the full right to read, compare, blueprint, microfilm, reproduce by ozalid or otherwise reproduce or copy by any method any or all of the said technical recorded information subject to disclosure,"

and included among the data subject to disclosure all data in any way related to the instant contract and "all other recorded technical information which were prepared or otherwise reduced to documentary form . . . in anticipation of said Contract NOrd-10,531" (emphasis added). It is particularly to be noted that the files of the defendant were filled with research data compiled by the defendant over his entire professional career, and also with research data compiled by The Jacobs Instrument Company at its own expense for a period of approximately a year before it began its Navy work; these could be and were seized as having been prepared "in anticipation of" the said Contract. There is an air of witchcraft about this decree -- it assumes that all these data were compiled by the defendant and his staff, before the existence of the contract, "in anticipation of" the Contract, and that the Government was entitled thereto. The defendant sorrowfully denies the possession of a crystal ball.

Even the data which were compiled in the direct performance of the Contract had much of the previously compiled material (company know-how) intermingled therewith,

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for the Navy had solemnly promised the Contractor that he could keep his technical data for his own use -- this was part of the reimbursement that was promised him for the performance of the work. Hence he was willing to let company proprietary data be used on the Navy project, for under the Navy promise its secrecy would not be jeopardized. This was a matter of the greatest importance to the defendant, for these technical data were his sole stock in trade -- if they were lost his company would be ruined.

As to whether the Government had any equitable right to the defendant's technical data, the defendant merely requests the Court to keep in mind the equitable maxims about coming into Court with clean hands, and that he who seeks equity must do equity, and review these maxims against the background of this case.

That the Government is seeking to establish a completely new legal principle in this case can best be understood by looking at the two "precedents" with which the courts below sought to justify the decrees in this case. The District Court cited Ordnance Engineering Corp. v. United States, 68 Ct. Cl. 301, and Houghton v. United States, 23 F. 2d 386 (C.A. 4); the Court of Appeals relied solely on the latter case.

The Ordnance Engineering case was a suit for patent infringement against Navy's Bureau of Ordnance, which was utilizing several patents of the plaintiff in the manufacture of star shells immediately after World War I. The court held that the Navy enjoyed a shop right to the use of such patents as were developed under a Navy experimental contract, but had no right to the use of patents developed by the plaintiff with his own funds. The Court found that the Navy infringed the latter patents.

The Houghton case, on which the Court of Appeals placed its sole reliance, was a case even less in point. Houghton was a chemist employed under civil service by the Public Health Service to perform developmental work toward improving fumigants. The dispute concerned the nature of the patent license on the improved fumigant to which the Government was entitled. The Court stated, in its opinion,

> "All that he did was to take the idea of the Surgeon General upon which the Health Service had been experimenting, and conduct experiments under its direction, for the purpose of determining how best to produce and combine the gases so as to achieve the results which the Surgeon General had in mind . . . . His regular salary was paid to him while thus engaged, and, when he deduced from the experiments the methods to be followed in producing and combining the gases he did merely that which he was paid his salary to do. Under such circumstances, we think there can be no doubt that his invention is the property of his employer, the United States."

It is to be noted that in neither the Ordnance Engineering case nor the Houghton case,

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was the disclosure of technical data an issue in any way. Both cases involved only disputes over patent licenses, and involved situations where there existed no written agreement concerning patent licensing, and the courts had to decide what type of licensing arrangement was implied by the existing circumstances. In the instant case there is a long patent clause in the instant contract, and no dispute over its terms is involved in this action.

The whole question as to whether the Government can arbitrarily seize the contents of a contractor's files has very important implications for our entire economic system, for the free enterprise system is based on the theory that a firm can grow through the exercise of superior skill; if this principle is negated by the Government pillaging the files of a successful firm and distributing the contents to its inept but favored competitors, all incentive to excel is lost; the favored concerns grow, the actively producing concerns are wiped out, and finally the entire system must collapse through the cutting off of productive ideas. It is a system very similar to communism, but it applies this repulsive philosophy to companies instead of individuals, and it possesses the same incentive-destroying features. It is a system which must be rejected, now.

(3) *Is a Government contractor an "employee" of the government whose technical data are subject to arbitrary search and seizure by virtue of his "employment"?*

Both of the courts below answered this question in the affirmative, and appeared to use this rationale as their chief justification for the search and seizure which took place. The District Court judge stated (Def. App., p. 80), "I find the law to be as set out in the Government's briefs dealing with the rights of an employer to the inventions, discoveries, that his employees make." To support this view the judge cited the Houghton and Ordnance Engineering cases which have been discussed, supra. The Court of Appeals endorsed this point of view by relying exclusively on the Houghton case in affirming the lower court's judgment.

It is the position of the defendant that the relationship between a contractor and the Government are determined by the terms of his contract. Where there is an important issue which is not covered by the contract, and the courts have to decide what sort of an implied relationship existed (as in the Ordnance Engineering and Houghton cases, cited supra), it seems reasonable for the courts to attempt to

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determine what the nature of the implied agreement might have been. But when the contract contains specific clauses covering the disputed points, it would seem that it is up to the court to interpret the contract, and not try to replace its terms with vastly different terms which it evolves from a distorted concept of the relationship between the parties. This case involved no employer and no employee -- it involved two parties to a contract. The contract involved an exchange of stated things of value under conditions elaborately defined in the contract. Neither party was the employee of the other, and certainly there is absolutely no legal justification whatever for holding that the defendant's company had to surrender its entire stock in trade, in violation of the contract terms, because the defendant was a Government employee.

The District Court judge sought to justify this rationale by continually directing attention to the fact that The Jacobs Instrument Company was a proprietorship, and not a corporation. When a Government contract expert pointed out that the contract in dispute contained the same "boiler plate" clauses as all other contracts issued during the same year, and the defense pointed out that the Government was not trying to seize the files of its big-business contractors, the judge took the position that corporations were different from proprietorships -- that corporations were decidedly <u>not</u> employees of the Government but independent contractors, and that proprietorships (and particularly small business proprietorships) having identical contracts <u>were</u> employees of the Government whose files were therefore subject to seizure. It is earnestly submitted that such a position has no basis whatever in law, for a corporation is supposed to be a "person" in a legal sense, and is not supposed to enjoy any special privileges or immunities. The rationale must clearly be applied across the board: either all Government contractors are Government employees whose files are subject to seizure in violation of their contracts, or none are. The issue of the sanctity of contracts is clearly involved, but, beyond that, the basis of the entire free enterprise system is involved.

Although the position of the lower courts in this matter is merely a part of the present Government process of deifying corporations and destroying small businesses, it is pointed out that its long-term significance goes far beyond this. In the present case the Navy is trying to seize the assets of a small business for the purpose of distributing them to certain favored large corporations. But once let

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the principle that a Government contractor is a Government employee, whose files are subject to pillage, be established and no organization, big or small will be safe. Big businesses and small will have their technical files seized and turned over to their competitors for improper reasons, as in the instant case, and the basis is laid for the seizure of the entire economy of the nation by a military-business combine.

It is respectfully submitted that there is no basis in law for this finding of the courts below; that this matter sets a precedent of great importance; and that it clearly calls for resolution by the Supreme Court.

(4) Is there a general federal common law strong enough to overturn the specific terms of a Government contract?

This question is, in a sense, ancillary to the foregoing one, for the District Court sought to bolster its theory that one party to a contract is the employee of the other by asserting, "This is in accord with the general law" (Def. App., p. 80). The Court was in effect holding that there existed a "general law" so strong that it could be used to overturn the terms of a Government contract, and the Fourth and Fifth Amendments to the U. S. Constitution. Speaking to this point, Justice William O. Douglas has stated ("We the Judges", p. 133),

> "A major source of irritation was removed by Erie R. Co. v. Tompkins, 304 U.S. 64, where the notion of a general federal common law was repudiated. It is now established that there is no transcendent body of federal common law in either the civil or criminal field. Federal courts sit to enforce the provisions of the Federal Constitution, federal statutes, treaties, and international law, and, in diversity cases, to apply the appropriate rules of state law."

In the Erie R. Co. case cited above, Justice Brandeis pointed out:

> "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

Justice Holmes has stated, in 276 U.S. at 533,

> "If there were such a transcendental body of law outside of any particular state but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist, in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it."

It is submitted that it is not within the power of the courts below to generate law which will overturn a contract, and that decrees based on such "general law" are not lawful, and are not in accord with the above-quoted findings of the Supreme Court.

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(5) Can the Government, by an assertion of need, effectively change the terms of a contract?

In the instant case, the contract was terminated by the Government (in the face of an expressed willingness by the contractor to complete the program on a mutually satisfactory and practical time schedule) for reasons which were clearly improper. This was done in June, 1953. However, by 1954 the Government decided it had to have access to the contractor's files to continue the program. At that time the White House was attempting to get the Navy to resume the program at the contractor's plant, but the Government arrogantly refused. The contractor's technical file data could have been acquired by reasonable negotiation procedures, by purchase, or possibly by condemnation. Instead the Government chose to bring a suit for specific performance under the contract, and has based its case primarily on the argument that the desired data are needed by the Government, and hence the courts must make a distorted interpretation of the contract in their favor or be accused of frustrating public policy.

First, this brings up the question of the sanctity of contracts, which either mean what they say, or they are worthless pieces of paper.

Secondly, it brings up the point that a company which does important work places itself in a position where its property will be arbitrarily confiscated for improper purposes, with the sanction of the courts, while a company which does routine and unimportant work can have the full protection of its contract. This will act to discourage inventors and research organizations from making contributions to critical defense work, and will encourage them to work on unimportant tasks, where the cry of "public policy" will not wreck them.

If there were a desperate need for the material for public use; if it could not be acquired by the Government by a variety of lawful procedures; if the Government were not (as was admitted clearly by the District Court -- see Def. App., p. 91) guilty of improper acts, one could see some human justification, if not legal justification, for attempting to distort the judicial process by forcing the Courts to fantastically misinterpret a perfectly clear and conventional contract. But in this case, not only are the foregoing matters involved, but the action demanded by the Government will serve to do further harm to a contractor who has already had his research organization destroyed; his professional career ruined, for no other reason than that he attempted to serve the United States faithfully, honestly, and conscientiously.

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(6) The Court of Appeals has stated, in this case, "Furthermore, it is clear that, without regard to the contract, the government is entitled to the benefit of all knowledge gained by the contractor in the course of the research for which the government was paying him." Is this true?

The sentence quoted in this question represents, in capsule form, the philosophy expressed by the courts below. It also represents a completely new legal theory; one for which there exists no precedent; and its potential effects will be destructive in the extreme to our economic system.

It is to be understood that in the instant case, as in the case of most similar contracts, the Government paid the contractor a very small fixed fee, and promised him in addition an equitable share of the production awards, if he produced something of value, and also the exclusive right to the use of his research findings. The contract clearly recognizes the existence of this last promise, for it calls only for the delivery of certain specific items of technical data. During the trial the Government sought to imply that research data were commonly surrendered by the contractor at the completion of his contract. The defendant, who had had wide experience in this field with big companies and small ones, denied this vigorously, but his contentions clearly had little effect. However, let us see what the Attorney-General of the United States had to say on this subject in a report to the President of the United States, dated 9 November 1956. This report (p. 2)

> ". . discusses the benefits which an industrial concern derives from the performance of federal research and development activity, including both the direct profit paid under the research contract, and the other intangible but even more important benefits which flow from this activity."

On p. 25 the report lists, as one of the industrial benefits to be received from the performance of government research, "acquisition of technical information", and goes on to state:

> "Perhaps the most significant industrial advantage to be obtained from participation in research is the acquisition, sometimes exclusively, of technical information resulting from experimentation. This is true not only narrowly in terms of formulae, but also with regard to the development of less expensive production methods.
>
> Such information may be acquired wholly or in part at Government expense."

The Attorney General further points out, on p. 26,

> "The Defense Department is currently considering amendment of procurement regulations to require that all research and development contracts include appropriate provisions to ensure that all possible detailed reports, plans and specifications be delivered to the Government on fulfillment of the contracted research."

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These excerpts from the Attorney General's report give a pretty good picture of the present state of affairs. As he points out, "Perhaps the most significant industrial advantage to be obtained from participating in research is the acquisition, sometimes exclusively, of technical information resulting from experimentation." That, then is the present state of affairs, and it is expressed in the terms of the instant contract. If the Government wants more disclosure of technical information when the contract is signed, it so states, and it arranges to pay for it, for if one form of reimbursement is taken away, it must be replaced by another form. This is an economic principle which is common to, and necessary to, any form of business activity.

If the unprecedented legal principle advanced by the Court of Appeals is sustained, the nation's military research economy will be thrown into chaos, for at one blow all contractors will lose their principal reimbursement, in violation of their contracts, and the Government will, on future contracts, have to pay staggering fees to make up for the loss to the contractors of their major source of reimbursement.

Also, weapons research will become a routine unimaginative drudgery, bought and paid for by the hour, for there will be no incentive whatever to excel. Communism in research works no better than it does in any other field. Furthermore, the ability of companies to receive rewards and grow, in proportion to their skill and enterprise, in the American tradition, will be wiped out.

It is therefore earnestly suggested that the legal theory advanced by the Court of Appeals is not in accordance with present research contracting principles or procedures, nor is it in accord with the principle of the sanctity of contracts, nor is it in accord with any precedent, nor is it compatible with a healty national defense program. It must be struck down with the greatest urgency.

(7) Is it a legitimate objective of the U. S. Government to attempt to force a merger, on a no-reimbursement basis, upon a highly successful small business doing work vital to the national defense, and to destroy that business deliberately and cold-bloodedly when its owner refuses to give his business away?

During the trial of this case, the defendant was badly handicapped by many factors, which are detailed elsewhere herein, and after presenting that part of his defense which dealt with the invalidity of the termination, he succeeded only in convincing the judge that the Government had acted improperly (Def. App., p. 91),

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but the judge maintained that the connection between the improper actions and the termination had not been proven. After the trial, new evidence came into the possession of the defendant, and he presented this (and other evidence) at a hearing on a motion for a new trial. The evidence presented linked the termination of the contract conclusively with the attempts to force a no-reimbursement merger on the defendant. This was admitted by the judge. The judge took the position, however, that the defendant should have acceded to the Government's demands for a merger, and was "utterly intransigent" in refusing to do so, and asserted that this intransigence was clear justification for the termination.

The facts appear to be clear and uncontested. The dispute arises from the moral questions behind them. The district court took the position that it is a legitimate procedure for the Government to demand that the owner of a business give it away without compensation, and it further felt that the quite obvious relationship between the defendant's refusal to agree to a giveaway merger, and the termination of the instant contract, was reasonable and just.

The defendant feels that the judge's position was very wrong, and sets a pattern which must be reversed before it does further harm. The defendant feels it was most improper for the Government to interfere in any way with the internal management of a contractor, much less attempt to force a merger, and a merger on giveaway terms at that. These are definitely not proper functions of Government. The fact that most of the pressure for a giveaway merger stemmed from the Chief of the Bureau of Ordnance, and the fact that this particular pressure was directed toward a giveaway merger with a single holding company, and the fact that the Chief of the Bureau of Ordnance was shortly to resign and take employment with that holding company, all combine to indicate unhealthy activities; activities which are directly related to the issues of this case (through their direct relation to the termination of the contract).

The sinister aspects of the present trend have not escaped the attention of the Attorney General of the United States, who advised the President of the United States, in a report dated 9 November 1956, as follows:

> "The imprecise factual indicators discussed in this report may point a warning that the total effect of the research and development effort may well tend to increase concentration of economic power. Moreover, that evidence indicates that this tendency toward concentration may be accentuated, and not retarded, by the administration of Government financing of research and development . . . The vital importance of preserving our economic system makes obvious the need for greater effort in this regard by the administrative agencies concerned."

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Behind those polite euphemisms and guarded phrases may be read a strong warning concerning a dangerous situation.

(8) Is a government contract to be considered to be terminated in the best interests of the Government when it covers a very important defense project; when the contractor who conceived the project and carried it through to the point where it was terminated is deemed by the cognizant Government official to be the only contractor qualified to carry the project through to completion; and when the contract is terminated under circumstances where the contractor is threatened that unless he contributes his company (including all assets) to an organization designated by the Navy, his contract will be terminated?

The facts on which this question is based are clear and undisputed. Although the defendant was forced to present his case on this point without counsel (although he requested one), and without witnesses (although he unsuccessfully requested the Court's permission to bring some in), and with only two days of preparation (although he requested more time), still he was able to convince the court that the Government had acted quite improperly, as the court acknowledged in its opinion of 14 December 1955 (Def. App., p. 91). At this stage of the case, however, the court contended that the relationship between the improper activities and the termination of the contract had not been proven. Later, new evidence came into the defendant's possession, and when this was presented at a hearing on a motion for a new trial held in February 1956, the court admitted that there was a direct relationship between the defendant's refusal to give his company away, and the termination of the instant contract. The court held, however, that the defendant's refusal was clear justification for the termination.

The Court of Appeals only paid attention to the first finding of the trial judge (that expressed in the opinion of 14 December 1955), stating "The trial judge went fully into this matter and found that the action terminating the contract was taken in good faith and for proper reasons; and we are bound by this finding, as we would not be justified on the record in holding it to be clearly erroneous. Rule 52(a) of the Rules of Civil Procedure." This opinion of the Court of Appeals completely ignores the later findings of the trial court. It also ignores the basic principle, expressed by the Supreme Court in United States v. U. S. Gypsum Co., 333 U. S. 364, 395 (1948),

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that "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." That the Government's improper actions were coupled directly with the termination of the contract was admitted by the trial court at a late date, when it apparently did not wish to undo the harm already wrought by its decrees, and this finding should not have been overlooked by the Court of Appeals.

Also, it is to be remembered that the defendant was prevented by the trial court from using witnesses; he had to put an important portion of his defense in by deposition. It is well recognized that in such a situation the Court of Appeals is in as good a position to review the evidence as is the trial judge, and under such circumstances the findings of the trial judge are by no means binding. As a matter of fact, it has often been held that in such circumstances a review should be in effect a trial de novo.

The facts of the case appear to be clear and uncontested -- it is the conclusion which is to be drawn from them which is in dispute. Was the termination in the best interests of the government, or was it not? The criteria for such a matter are set forth in 41 U.S.C. 321, which states ". . . any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." It is the position of the defendant that the facts show clearly that the termination was not in the best interests of the government, as here defined.

The general implications of this matter far transcend the instant case, for what is basically involved is whether the nation, in an era of technological warfare, is going to have a sound weapons development program, or whether the program is going to be manipulated by Government officials for private gain to the vast detriment of the national military stature. Is it going to be possible for Government officials to try to force mergers on successful research and development contractors, and, when the no-reimbursement mergers are rejected, are they going to be permitted to terminate the contract and search and seize the technical files of the "intransigent" contractor? And when these acts occur, are the courts going to acknowledge their existence and placidly place the judicial seal of approval on such activities, and castigate the contractor for his "intransigence" in refusing to give away his company, and in

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objecting to search and seizure of his files? The trend established by the actions of the courts below has the most sinister implications -- it is no exaggeration whatever to assert that the nation's life or death as a free state could be tied up in the way this matter is resolved by the Supreme Court.

Obviously the nation which denies the protection of law and justice to its scientists and research organizations is treading on dangerous ground, for the destruction of the effectiveness of those individuals and organizations cannot have beneficial results to the nation as a whole, regardless of the specific benefits to be derived by certain companies and individuals.

At the end of World War II the United States led the world in weapons research. During that war it had evolved thousands of new weapons, such as the atomic bomb, microwave radar, and the proximity fuze, under a system of free science -- a system whereby research was performed by qualified research organizations working under, and responsible to, qualified weapons scientists. That extremely successful system has now been completely destroyed, and replaced with a system whereby weapons research is managed exclusively by the military forces, who are engaged in a widespread effort to completely wipe out the successful scientific organizations which are dedicated to weapons research, and to force all such research into the large production organizations which have no capability whatever for successfully performing such research, but which are very adept at passing out high salaried jobs (the salaries being chargeable to the public via Government contracts) to former military men who have collaborated with them, as in the instant case. The Nation can have a corrupt, inefficient weapons development program, or it can have a successful one (as it had during World War II). Which type it has at the present time need not be gauged merely by the instant case -- one need only compare the progress in the weapons development field now being made in the United States with the progress being made by such an inept and bungling competitor as Russia. One hears complaints that the nation's scientific progress is being hampered by a lack of scientific personnel, but this silly story completely ignores the reality of America's successful work during the last War, at a time when it had far fewer scientists than now, and when many of those scientists were in the armed forces and not available for scientific work. But then we had a system of free science -- a system free of corruption -- a system free of arbitrary military domination. It was a system that worked. What we have now is clearly

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evident from viewing the instant case, and by viewing our extremely deficient military stature.

The Supreme Court has here the opportunity of expressing its disapproval of improper manipulation of weapons research, or of condoning it.

(9) Has the important principle of equity, "He who demands equity must come into court with clean hands" been abolished, or is the Government in a special category of litigants to which this principle does not apply?

The fact that the Government had clearly engaged in improper activities in its relations with the defendant was admitted by the trial court. How, then, can equitable relief be granted the Government under such circumstances? In pre-trial hearings the trial judge stated that issues of right or wrong in the actions of the Government would determine whether it was entitled to equitable relief. This appears to be a reasonable position for the court to take. But the court did not cling to this principle. When wrongful action by the Government was clearly demonstrated, equitable relief was still granted. The defendant feels that this should not have been done -- that it is vital to our system of justice that the Government be required to adhere to ordinary standards of decency and justice in dealing with its citizens. If, on the other hand, we adopt the principle that anything the Government does is right; that normal standards of law or equity or morality do not apply to the Government; then we set loose a condition of anarchy; we destroy our concept of the Government operating by checks and balances. What is left is chaos. No citizen would be safe if the type of oppression which occurred here were sanctioned by the courts, and became general. It is contended that this case presents a clear example of a breach of the above-cited maxim, and that such a breach must be considered intolerable.

(10) Did the District Court act, in this case, as an arm of the judiciary, or as an arbitrary administrative panel of the Executive Branch of the Government whose function was the condemnation of private property without compensation, in violation of the Fifth Amendment of the U. S. Constitution?

Basically, the question here is one of due process, but the lapses from due process were so extravagant, and so extraordinary, that the question is cast in the above form. The judge was conscientious but inexperienced, and his inexperience was played upon by determined men who told him in effect, "The Government needs the defendant's property for national defense; let's grab it quickly without any legalistic

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quibbling over trivial details. The Judge never stopped to inquire as to whether the property really was needed for national defense, or for use in private ventures, nor did he bother to inquire as to whether the property could be acquired by negotiation, or purchase, or condemnation -- he swallowed the tale that was told him, hook, line, and sinker, and permitted the most fantastic acts of injustice to be carried out in his presence, and finally even became an active party to them himself. And all this time he was clearly acting conscientiously and in what he considered the honest fulfillment of his duties! One can understand how an inexperienced judge could be used in this fashion by men he trusted, but it is obviously necessary to reverse the judgments he rendered under these circumstances, for the integrity of the judicial system is involved, and in a very obvious manner. The question is very simple: either we have a judicial system, or we don't. The courts are to interpret and enforce the laws, or they act as administrative panels for the seizure of private property for the use of influential cabals. The Constitution is in effect, or it has been quietly overturned.

(11) Must a defendant in a suit give up his right to sue on other issues related to the same contract, but not related to the instant suit, in order to obtain the relief granted in the suit?

The instant contract promised the defendant reimbursement for certain expenditures he was authorized and/or required to make on behalf of the Government. At the time this suit came to trial, the defendant had expended approximately $60,000 for which he had not been reimbursed. This formed the basis for the defendant's counterclaims. Of this amount, he was awarded approximately one-third, or about $20,000 by the district court. However, the award was surrounded by a multitude of conditions (one being that the Navy only had to deposit the money in court if it wanted the microfilm, and the money has never been deposited, so it is not available to the defendant even should he choose to fill the other requirements), another of which was that the defendant agree to forego his right to pursue legal remedies for various injuries suffered at the hands of the Government in matters related to the instant contract. So, in order to get money which was clearly owing to him under the instant contract, the defendant is supposed to surrender all right to legal recourse on unrelated matters. As the Government has clearly done the defendant tremendous harm, he clearly must seek legal remedies for that harm. There appears to be no reason in law or

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equity why he should be estopped from seeking legal remedies in those matters in order to be reimbursed for money he has expended under the contract. There is no relation whatever between the two issues. The issue here is one of due process, for the court's decree is an attempt to force the defendant to desist from pursuing legal remedies in matters unrelated to the instant suit.

(12) Was the district court justified in awarding the defendant only one-third of his counterclaims?

The counterclaims related to money expended by the defendant under the contract (about $60,000), and of the amount expended, about one-third (or about $20,000) was awarded the defendant. The various reasons given by the district court for denying the defendant reimbursement for two-thirds of his expenditures are curious and contradictory. They are as follows:

(a) The Court warned the defendant, during the trial, through his attorneys, that if he elected to pursue his termination defense (dealing with the validity of the termination of the disputed contract), he would be severely treated in the counterclaim award.

(b) The Court stated that it was diminishing the counterclaim award because it did not feel that the defendant should be reimbursed for expenses incurred in storing, protecting, and maintaining disputed property while awaiting the outcome of the litigation. Yet the Government had demanded that this property be turned over to it by the Court at the time it filed suit, and the Court had refused to honor the demand, thus in effect sanctioning the retention of the property by the defendant pendente lite. In addition the defendant had claims of a lien nature against the property, as well as claims vested in certain property rights.

(c) The Court stated in its opinion of 1 December 1955 that it felt that the charges for guarding the property had been padded. Subsequent testimony showed that the guard expense had never appeared in the counterclaims as a specific item, and hence the item could scarcely be challenged. Testimony was also put in which showed in a general way what portion of the counterclaims could be considered as guard expense. After this additional testimony the Court admitted in its opinion of 14 December 1955 that it was impossible to determine the magnitude of the charges for various items.

(d) In its opinion of 1 December 1955 the court stated it was reducing its award to the defendant in order to reduce the magnitude of the fixed fee paid him. Yet in

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its opinion of 14 December 1955 the Court stated that it would not reduce the fixed fee paid the defendant, as such a reduction would be grossly inequitable. However, the counterclaim award was identical in both cases. How these conflicting statements and circumstances are to be reconciled is not clear.

(g) The counterclaims included a charge of $3,700 which had been expended by the defendant as legal expense up to the time of the trial. This was specifically an allowable charge against the contract, under its terms. The Court admitted this, but stated it would not allow legal expenses. It is contended that it is not within the jurisdiction of the court to change the terms of a contract, and to disallow expenses which are clearly allowable by the terms of a contract. In addition to the above expense, the defendant has paid another $700 in legal expenses since the end of the trial, and has been billed an additional $7,500 which remains unpaid. It is contended that some rational arrangement to handle legal expenses in accordance with the terms of the contract must be effected. A total of nearly $12,000 is involved in this item.

The court's action in depriving the defendant of some $40,000 in reimbursement for expenditures incurred under the contract has resulted in the incurring of a large net loss by the defendant for the many years of effort expended by The Jacobs Instrument Company on the Mark 6 project, completely wiping out the small fixed fee received for the work. This may have the appearance of justice to the district court, but it certainly does not have that appearance to the defendant. The trial court spent about one hour taking testimony on the very complex issues involving the disposition of a very large sum of money in the counterclaims, and clearly had no idea of, or interest in, the contractual details, and just made a vague gesture at a settlement by awarding one-third of the counterclaims. This just does not represent justice, nor does it represent due process of law.

Donald H. Jacobs

Date: FEB 4 1957

SECTION VI

Decree of 13 December 1955

The above-entitled case having come on for trial, the testimony having been heard, the exhibits having been read and considered, counsel for both parties having been heard and briefs of both parties on all issues having been read and considered, it is this 13th day of December 1955, by the United States District Court for the District of Maryland,

I.

ORDERED, ADJUDGED AND DECREED(a) that the United States is entitled to all of the tangible physical property (not including technical documents or stationery and paper) furnished by the Government, purchased by the defendant, or allocated by the defendant from stock on hand, under, pursuant to, in connection with, or in anticipation of Contracts NOrd 27466 and NOrd 10531; (b) that the defendant be and he is hereby directed to deliver and permit possession and removal of all of such tangible physical property, including in particular but not by way of limitation, all tangible physical property listed on defendant's Inventory Schedules Nos. V through XXV, (all of which have been filed herein with the exception of Inventory Schedule XXI), to the Bureau of Ordnance of the Navy Department or any of its duly authorized representatives, including but not by way of limitation E. P. Schweitz and representatives of the Naval Gun Factory and representatives of the Naval Ordnance Plant at Indianapolis, the security clearance of said representatives to be determined by the Contracting Officer; (c) that the delivery and removal of tangible physical property as aforesaid shall be in such quantities, of such types and at such times during the hours of 8 a.m. to 4:30 p.m., Monday through Friday, on or before January 21, 1956, as the Bureau of Ordnance or its duly authorized

representatives shall determine; (d) that for the purposes of taking possession of said tangible physical property and removing the same, the Bureau of Ordnance or its duly authorized representatives, including but not by way of limitation, E. P. Schweitz and representatives of the Naval Gun Factory, shall have full and complete right of access to the defendant's plant at Bethesda, Maryland, and to any and all rooms, lockers, cabinets, safes, storing bins, and any other spaces or containers located or existing at said plant in which such property is or may be stored; (e) that such removal of said tangible physical property shall be at the cost of the Bureau of Ordnance and any of its duly authorized representatives, and the United States shall indemnify the defendant for any direct damage or injury to his property or property leased or rented by him, his person or the persons in his employ sustained in the course of such removal of property; (f) that the defendant shall provide, without cost to the United States, any reasonable assistance found by the Bureau of Ordnance to be necessary or needed in order to locate the tangible physical property listed on Inventory Schedules V to XXV; (g) that any bona fide dispute over the issue of whether or not any item of tangible physical property was furnished by the Government, purchased by the defendant, or allocated by the defendant under, pursuant to, in connection with, or in anticipation of Contracts NOrd 10531 and NOrd 27466, shall not delay the removal of undisputed property and shall be subject to the unilateral decision of neither the Bureau of Ordnance or its representatives nor the defendant but shall be referred to this Court and a prompt hearing thereon duly had; provided however that inasmuch as this Court has found that the property listed on Inventory Schedules V to XX and XXII to XXV belongs to the United States, the defendant shall not be entitled to a hearing on a dispute over any such property; and (h) that the provisions of this paragraph I of this Decree shall be operative immediately and shall not be subject to stay by the appeal of either party from this Decree; provided however that the provisions of this paragraph I of this Decree shall not operate in any way (1) to deprive the defendant of any rights he might have by virtue of the Patent Provisions of Contract NOrd 10531 to apply for and obtain patents on any "subject inventions" as that word is defined in said Patent Provisions or (2) to deprive the defendant of any property rights which he may have in non-patentable "subject inventions" in the form of property rights in and to methods of construction, processes of manufacture, construction techniques, trade secrets, and other know-how except to the extent that plaintiff may have acquired property rights by virtue of Contract NOrd 10531 and to the extent that such property rights may be limited or qualified by the disclosure of documents required by Paragraph II of this decree or the provisions of Article 23(b) and paragraph (d) of the Patent Provisions of Contract NOrd 10531.

II.

ORDERED, ADJUDGED AND DECREED FURTHER (a) that the United States is entitled to full and complete disclosure of all the technical recorded information prepared or otherwise reduced to documentary form under, pursuant to, in connection with, or in anticipation of Contract NOrd 10531, including in particular but not by way of limitation: full and complete disclosure of the master log or index of drawings, all drawings listed in the master log or index, all other drawings or sketches of any nature, all card files of drawings and other data, all blueprints, specifications, plans and data of any nature, all engineering notebooks, all memoranda for files, all informa memoranda and reports, all design studies, all informal documentation and all other recorded technical information, which were prepared or otherwise reduced to documentary form under, pursuant to, in connection with, or in anticipation of said Contract NOrd 10531, on or after February 15, 1949; (b) that the defendant be and he is hereby directed to make said disclosure of documents and give full and complete access to the Bureau of Ordnance of the Navy Department or any of its duly authorized representatives, the security clearance of said representatives to be determined by the Contracting Officer; (c) that said disclosure of documents and access thereto shall be permitted by the defendant in such quantities, of such nature and at such times during the hours of 8 a.m. to 4:30 p.m., Monday through Friday, on or before January 21, 1956, as the Bureau of Ordnance or its duly authorized representatives shall determine, the full and complete access given to include access to the defendant's plant at Bethesda, Maryland, and to any and all rooms, lockers, cabinets, safes, files, drawers, and any other

spaces or containers located or existing at said plant; (d) that said right of the United States and the Bureau of Ordnance to disclosure and access shall include the full right to read, compare, blueprint, microfilm, reproduce by ozalid or otherwise reproduce or copy by any method any or all of the said technical recorded information subject to disclosure but shall not include the right to study such documents or take notes of their contents; (e) that such copying of documents subject to disclosure shall take place at the plant of the defendant and shall be at the cost and under the sole direction of the Bureau of Ordnance or its duly authorized representatives, and the United States shall indemnify the defendant for any direct damage or injury to his property, or property leased or rented by him, his person or the persons in his employ sustained in the course of such copying of documents; provided however that the defendant shall supply, without cost to the United States, all electric power needed for said copying, and provided further that the Bureau of Ordnance shall have the right, in the presence of the defendant or an employee of the defendant, if the defendant so desires to be present, and upon agreement of the parties or further order of the Court, to remove any drawing, diagram or other chart to another Naval Installation for copying if the drawing, diagram or other chart is too large to be reproduced by the apparatus or equipment located at or brought in to the defendant's plant; (f) that the cost to the defendant in being present at the time such copying is made by the Bureau of Ordnance as aforesaid, represented by wages or salaries of himself and his employees and/or plant space occupied by Naval personnel, shall be borne solely by the defendant; (g) that any bona fide dispute over the issue of whether or not any disclosure for copying should be made by the defendant to the Bureau of Ordnance as aforesaid because the document in issue was not prepared under, pursuant to, in connection with, or in anticipation of Contract NOrd 10531, shall not delay the copying of undisputed documents and shall be subject to the unilateral decision of neither the Bureau of Ordnance or its representatives nor the defendant but shall be referred to this Court and a prompt hearing thereon duly had; and (h) that the provisions of this paragraph II of this Decree shall be operative immediately and shall not be subject to stay by the appeal of either party from this Decree; provided however that the provisions of this paragraph II of this Decree shall not operate in any way (1) to deprive the defendant of any rights he might have by virtue of the Patnet Provisions of Contract NOrd 10531 to apply for and obtain patents on any "subject inventions" as that word is defined in said Patent Provisions or (2) to deprive the defendant of any property rights which he may have in non-patentable "subject inventions" in the form of property rights in and to methods of construction, processes of manufacture, construction techniques, trade secrets, and other know-how except to the extent that plaintiff may have acquired property rights by virtue of Contract NOrd 10531, and to the extent that such property rights may be limited or qualified by the disclosure of documents required by this Paragraph or by the provisions of Article 23(b) and paragraph (d) of the Patent Provisions of Contract NOrd 10531; and provided further that the provisions of this paragraph II of this Decree shall not discharge any of the obligations of the defendant under the Patent Provisions of Contract NOrd 10531, including but not by way of limitation, the obligations of the defendant to grant the United States licenses to patentable inventions, to designate, list and make disclosure to the United States of "subject inventions" and to grant the United States the power to inspect all patent applications, subject to the proviso contained in paragraph (d) of said Patent Provisions.

III.

ORDERED, ADJUDGED AND DECREED FURTHER that after the Bureau of Ordnance and its representatives have obtained, produced, developed or otherwise made copies of all documents subject to disclosure as aforesaid, including the development at any Navy Installation in the greater Washington area (which development shall take place in the presence of the defendant or any employee of the defendant, if the defendant so desires) of microfilms in order to ascertain whether said copies are legible, readable, and correct, but prior to any further use or delivery except as provided above of said copies by the United States, including the Bureau of Ordnance or its representatives, the United States shall cause all of said copies of documents, including all prints and negatives of microfilms, to be deposited with the Clerk of the United States District Court for the District of Maryland to be held by said

Clerk subject to further order of this Court.

IV.

Other questions involved in the case are reserved for further determination.

ROSZEL C. THOMSEN
Chief Judge, United States District Court

SECTION VII

Decree of 29 December 1955 (Final Decree)

The above entitled case having been reopened, additional testimony having been taken, the exhibits having been read and considered, and both parties having been heard, it is this 29 day of December, 1955, by the United States District Court for the District of Maryland,

ORDERED, ADJUDGED AND DECREED (a) that this decree supplements the decree of this Court filed on December 13, 1955; (b) that when the copies of documents subject to disclosure, including all prints and negatives of microfilms, are deposited with the Clerk of this Court pursuant to paragraph III of the decree of this Court dated December 13, 1955, said Clerk shall cause said copies of documents to be impounded under seal and placed for safekeeping in a safe or vault approved for security purposes by the Court; (c) that the Clerk of this Court shall release and deliver to the United States, including the Bureau of Ordnance of the Navy Department or any of its duly authorized representatives, said copies of documents upon the deposit by the plaintiff with the Clerk of a check or checks in the aggregate amount of $20,072.91, payable to Donald H. Jacobs, and a statement that the Government will not appeal from this decree; (d) that the Clerk shall release and deliver to Donald H. Jacobs said check or checks aggregating $20,072.91 upon order of this Court and upon the deposit by the defendant with the Clerk of (1) a certificate of compliance with the Patent Provisions of Contract NOrd 10531, as amended, said certificate to be signed by the defendant and approved by the Contracting Officer, which approval shall not be unreasonably withheld, and (2) a release to the United States in the form attached to this decree as part hereof.

ROSZEL C. THOMSEN
Chief Judge, United States District Court

CONTRACTOR'S RELEASE UNDER
CONTRACT NOrd 10531

KNOW ALL MEN BY THESE PRESENTS:

In consideration of the sum of $756,433.67 lawful money of the United States of America (hereinafter called the Government), $736,360.76 of which has been paid and $20,072.91 of which is to be paid by the Government under the above mentioned contract, the undersigned contractor does, and by the receipt of said sum shall, for himself, his heirs, representatives and assigns, remise, release and forever discharge the Government, its officers, agents and employees of and from all liabilities, obligations and claims whatsoever in law and in equity, under or arising out of contract NOrd 10531; except such rights as are reserved to the undersigned Donald H. Jacobs by the decrees of the United States District Court for the District of Maryland in the suit entitled United States of America vs. Donald H. Jacobs, doing business as The Jacobs Instrument Company, Civil No. 7459 in said Court.

Donald H. Jacobs

Witness:

RCT

SECTION VIII

Court Order of 10 February 1956

The defendant having filed a motion for a "mistrial" along with two supplemental memoranda and affidavits, affidavits of former counsel of the defendant having been filed, additional testimony having been taken, additional exhibits having been introduced, read and considered, and all parties having been heard, it is this 10th day of February 1956, by the United States District Court for the District of Maryland,

ORDERED that the defendant's motion for a "mistrial", whether it be considered as a motion for a new trial or a motion to reopen the case or a motion for a rehearing, be and the same is hereby denied.

/s/
Chief Judge, United States District Court

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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NO. 7230.

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Donald H. Jacobs, doing business as The Jacobs Instrument Company,
Appellant and Cross-Appellee,

versus

United States of America,
Appellee and Cross-Appellant

---

CROSS-APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.

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(Argued November 13, 1956. Decided December 22, 1956.)

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Before PARKER, Chief Judge, SOPER, Circuit Judge, and HOFFMAN, District Judge.

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Donald H. Jacobs, Pro Se, and Bernard Cedarbaum, Attorney, Department of Justice, (George Cochran Doub, Assistant Attorney General, Walter E. Black, Jr., United States Attorney, and Samuel D. Slade, Attorney, Department of Justice, on brief) for Appellee and Cross-Appellant.

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PER CURIAM:

These are cross appeals in an action instituted by the United States against a government contractor. The contract, which was entered into in April 1949, was a research and development contract for the development of a bombing system, and pursuant to its terms the government placed property in the possession of the contractor and made payments to him in excess of $700,000. The contract provided that the government might terminate it at any time; and it was terminated under this provision in June 1953, although certain costs allowable under the contract continued for a while thereafter.* When the con-

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*The pertinent provision of the contract is as follows:

"Article 23: (a) Notice of Termination of Contractor's Right to Proceed. The performance of work under this contract may be terminated by the Government in whole, or from time to time in part, whenever for any reason the Contracting Officer shall determine any such termination is for the best interests of the Government. Termination of work hereunder shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract shall be terminated and the date upon which such termination shall become effective.

* * * * *

"(d) In the event of the failure of the Contractor and Contracting Officer to agree as provided in paragraph (c) upon the whole amount to be paid to the Contractor in connection with the termination of work pursuant to this Article, the Government, but without duplication of any amounts agreed upon in accordance with paragraph (c), shall pay to the Contractor the following amounts:

"(1) All costs and expenses reimbursable in accordance with this contract, not previously paid to the Contractor for the performance of this contract prior to the effective date of the Notice of Termination and such of these costs as may continue for a reasonable time thereafter with the approval of or as directed by the Contracting Officer (which approval shall not be unreasonably withheld) provided, however, that the Contractor shall proceed as rapidly as practicable to discontinue such costs. * * * * *."

tractor refused to turn over to the United States certain property and records and drawings made in the course of the work done, this suit was instituted to require him to turn them over. He filed answer denying the right of the United States to the records and drawings in question and asserting counterclaims under the contract aggregating $59,089.94. After extended hearings, the District Judge entered a decree directing him to turn over certain tangible physical property and to permit the government to make copies and micro-film records of the records and drawings made in the course of the work under the contract, but imposed as a condition of this relief that the government pay him the sum of $20,072.91 on account of the matters involved in the counterclaims. Both sides have appealed.

We think that the decree was proper and should be affirmed. The contractor makes lengthy contentions to the effect that the action of the officer of the government in terminating the contract was not taken in good faith but for the purpose of aiding other persons and corporations who desired to profit by what the contractor had done. The trial judge went fully into this matter and found that the action terminating the contract was taken in good faith and for proper reasons; and we are bound by this finding, as we would not be justified on the record in holding it to be clearly erroneous. Rule 52(a) of the Rules of Civil Procedure. The government had the right to terminate the contract at any time that the contracting officer deemed this in the interest of the government, and as pointed out by the trial judge, the government, upon its termination, was entitled to the benefit of all knowledge which had been acquired in the progress of the work.* Furthermore, it is clear that, without regard to the contract, the government is entitled to the benefit of all knowledge gained by the contractor in the course of the research for which the government was paying him. See Houghton v. United States 4 Cir. 23 F. 2d 386, and cases there cited. In this connection, it should be noted that the patent rights of the contractor and his rights in non-patentable "subject inventions" including "methods of construction, processes of manufacture, construction techniques, trade secrets and other know-how" were protected by the decree, with a provision that any dispute arising with regard thereto would be settled by the court after hearing.

In imposing as a condition of the decree that the government pay to the contractor the sum of $20,072.91, being the amounts found by the court to be due the contractor under the contract and for guarding for the government the secrecy of the records and drawings, the court was merely applying the well settled principle that he who seeks equity must do equity, a principle binding upon the government, as well as upon individuals, United States v. Detroit Lumber Co. 200 U. S. 321; Lacy v. United States 5 Cir. 216 F. 2d 223. We quite agree that the fact that the court is granting relief to the government does not authorize it to entertain counterclaims which amount to suits which Congress has not authorized. United States v. Shaw 309 U. S. 495, 502. This, however, is a very different thing from conditioning the granting of equitable relief upon the doing of justice with respect to the subject matter of the relief granted. Here the court was directing the contractor to permit the copying of records and drawings which had been made by him under the contract with the government. The order was made in enforcement of the provisions of the contract and it was but fair and equitable that the government be required to pay the balance due under the contract when granted such relief. Certainly, one who asks specific performance of a contract should be required as a condition thereof to pay to his adversary the amount due him under the contract. Very much in point is the case of Lacy v. United States, supra, where the court conditioned the granting of an injunction asked by the government upon its paying compensation for property or instituting proceedings for its condemnation. In that case Judge Rives, speaking for the court, said:

> "The Government when applying for relief in a court of equity is as much bound to do equity as is a private litigant. United States v. Belt, D.C., 47 F. Supp. 239, vacated 319 U. S. 521, 63 S. Ct. 1278, 87 L. Ed. 1559, affirmed 79 U. S. App. D.C. 87, 142 F. 2d 761; United States v. Detroit

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*Article 23(b)(6) of the contract provides:

"After receipt of Notice of Termination and except as otherwise directed by the Contracting Officer, the Contractor shall transfer title (to the extent that title has not already been transferred) and deliver to the Government in the manner and to the extent and at the times directed by the Contracting Officer *** (ii) the plans, drawings, information and other property which, if the contract had been completed, would be required to be furnished to the Government.

Timber and Lumber Co., 200 U. S. 321, 338, 26 S. Ct. 282, 50 L. Ed. 499; Daniell v. Sherrill, Fla., 48 So. 2d 736, 737, 23 L.R.A. 2d 1410. 'When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter.' United States v. The Thekla, 266 U. S. 328, 339, 340, 45 S. Ct. 112, 113, 69 L. Ed. 313. It is true that that principle cannot be pressed to the extent of waiving the sovereign immunity to suit by way of counterclaim. United States v. Shaw, 309 U. S. 495, 502, 60 S. Ct. 659, 84 L. Ed. 888; In re Greenstreet, Inc., 7 Cir., 209 F. 2d 660, 666; Oyster Shell Products Corp. v. United States, 5 Cir., 197 F. 2d 1022. The Government, however, is still bound to do equity and, as a condition precedent to relief in this case, either to agree upon and pay to the property owner such compensation as it may owe him or, failing such agreement, to file the necessary proceedings for the ascertainment of such compensation."

The government relies upon the disputes clause of the contract, which provides that disputes as to allowable costs shall be decided by the Chief of the Bureau of Supplies and Accounts and that in the meantime the contractor shall diligently proceed with performance. It is clear, however, that this clause had no application to the case here, where the contract had been terminated, where the government was seeking the aid of the court to get copies of records and drawings and where it was necessary, in the interest of justice, that payment of the amount justly due the contractor be made a condition of the relief granted. See E. I. Du Pont De Nemours & Co. v. Lyles & Lang Construction Co. 4 Cir. 219 F. 2d 328, 333-334.

The government complains of a provision of the order which made its right to appeal dependent upon paying into court the amount found to be due the contractor. It was error, we think, to place any such limitation upon the right of appeal; but no harm has been done here, as the appeal has been taken and full consideration has been given to it.

Affirmed.

# In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 752

THE JACOBS INSTRUMENT COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinions of the United States District Court for the District of Maryland (R. 22–23, 90–136) are unreported. The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. 83–85) is reported at 239 F. 2d 459.

### JURISDICTION

The judgment of the Court of Appeals was entered on December 22, 1956 (Pet. 83). The petition for a writ of certiorari was filed on February 5, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

## QUESTIONS PRESENTED

1. Whether, in light of the provisions of the research and development contract between the United States and the petitioner, the United States is entitled to disclosure of recorded technical data prepared by the petitioner in the course of work performed under the contract.

2. Whether the District Court's finding, sustained by the Court of Appeals, that the termination of the contract by the Government was not arbitrary or in bad faith, is clearly erroneous.

3. Whether the amount of termination costs owing to the petitioner was correctly determined by the District Court.

4. Whether, in the circumstances of this case, the District Court abused its discretion in denying petitioner's motion for a "mistrial."

## CONTRACT PROVISIONS INVOLVED

Pertinent portions of the contract are set forth in the Appendix, *infra,* pp. 15–18.

## STATEMENT

In April 1949, the United States entered into a research and development contract with the petitioner for the development of a bombing system. The contract was terminated by the Navy prior to completion by letter of June 26, 1953, in accordance with Article 23 of the contract (App., *infra,* p. 15), which provided for termination "for the best interests of the Government." The termination was prompted by the inability of the parties to reach agreement with respect to several non-technical matters during the

course of negotiations for curtailing the original scope of the contract because of budgetary limitations (R. 94).

In the letter of termination, the Government called for the return to it of all property to which it was entitled under the contract, including a complete report of all work done, a master index of drawings, and various drawings, notebooks, memos, and studies pertaining to work under the contract (R. 95). Petitioner did not dispute the Government's right to most of the property and he submitted a report of work done and about 1,000 drawings, but he refused to turn over additional technical records and the master index. Negotiations for settlement of these questions continued, and the Government paid monthly termination costs until February 25, 1954, when the contracting officer notified the petitioner that such costs would no longer be allowable and reimbursable. This suit was then instituted seeking an order compelling petitioner to deliver the physical property and recorded data and restraining him from otherwise disposing of them (R. 37–42).

Petitioner denied that he was required to turn over the research data and further contended that the Government's termination of the contract was arbitrary and in bad faith (R. 43–56, 58–86). In addition, he interposed four counterclaims, aggregating approximately $60,000. The first three related to costs of protection and storage of the property and data in dispute, both before and after allowable costs had been terminated by the contracting officer (R. 49–51, 86–87). The fourth counterclaim related to a 1% re-

serve withheld by the Government under the contract (R. 87). The Government denied the court's jurisdiction over the counterclaims and made an oral motion to dismiss grounded on the $10,000 jurisdictional limitation on Tucker Act suits in the district courts.[1]

The District Judge held that, on the basis of the terms of the contract and the law governing the rights of an employer to the inventions of his employee, the Government was entitled to full disclosure of the results of petitioner's research and could examine, copy, and use all of the material, although he was unwilling to agree that the contract gave the Government title to the various drawings and records in suit (R. 101). In addition, the court held that the Government was entitled to immediate possession of the physical property (R. 113) and that petitioner's second defense, that the termination of the contract was invalid, should be flatly rejected (R. 124–31).

Turning to the question of jurisdiction over the counterclaims, the court reviewed the authorities and concluded that jurisdiction was lacking to enter a judgment against the United States on the counterclaims since those claims could not be the subject of an original action in the district court (R. 109–11). But the court went on to impose as a condi-

[1] 28 U. S. C. 1346 (a) (2) provides in pertinent part:

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * * * * *

"(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded * * * upon any express or implied contract with the United States."

tion to the granting of equitable relief to the Government the requirement that the Government pay to the contractor the sum of $20,072.91 [2] to which the contractor was found to be entitled on account of the matters involved in the counterclaims.[3] This requirement was embodied in the District Court's final decree of December 29, 1955 (R. 135–36).

On January 25, 1956, approximately four weeks after the final decree was entered, petitioner filed a motion for a "mistrial" on the grounds that he had not been adequately represented by counsel, that certain government exhibits were fictitious or grossly erroneous, and that he had discovered new evidence which would have produced a result favorable to him on the termination question. After hearing, this motion was denied and an order entered to that effect (R. 22–23).

Both sides appealed. Petitioner contested the District Court's ruling with respect to the merits of the Government's claim, the amount determined to be owing to him on his counterclaims, and the denial of his motion for a "mistrial." The Government contended that the District Court could not properly condition the granting of relief to it when to do so involved the adjudication of a contract claim against

[2] This includes the entire amount claimed in the first and fourth counterclaims, a total of approximately $11,600. The rest of petitioner's recovery consists of an allowance of $400 per week for the guarding of the papers and records by Jacobs and his associates after the Bureau of Ordnance cut off termination costs in February 1954.

[3] The Government is now considering whether to file a cross-petition for a writ of certiorari to review this portion of the judgment.

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the United States in excess of $10,000.[4] The Court of Appeals affirmed the District Court's decree in all material respects (Pet. 83–85).

**ARGUMENT**

The questions raised by the petition relate solely to a determination of certain rights of the parties under the contract here involved and to the factual circumstances surrounding the termination of the contract by the Government. Petitioner is requesting this Court to review the analysis made by both courts below of the applicability to him of particular contract provisions, and the findings of fact made by the District Court, in which the Court of Appeals completely concurred. This is the kind of review this Court has often stated it will not undertake. *Comstock* v. *Group of Investors,* 335 U. S. 211, 214, and cases there cited. No question of general importance or as to which there is a conflict of decision is presented. Furthermore, the results reached by both courts below on the questions raised by the petition are plainly correct.

1. The Government had originally taken the position that under the contract it had title to the various technical documents in question and that these should be turned over to it in original form. The District Court found this to be a "close and doubtful question" (R. 101) and preferred to base its decision on those provisions of the contract which "undoubtedly give the Government the right to examine, study, copy, photograph, and use all of the writings, for any pur-

[4] See note 3, *supra.*

pose covered by the contract" (*ibid.*). Since this satisfied the technical requirements of the Navy, the Government did not further insist on absolute title. The Court of Appeals, without considering necessary an elaborate discussion of the question, agreed that upon termination of the contract the Government was "entitled to the benefit of all knowledge which had been acquired in the progress of the work" (Pet. 84).

The contract provisions on which this right to disclosure is based are reprinted in full in the Appendix (*infra*, pp. 15–18) and can be briefly summarized. Schedule A of the contract, which set forth the scope of the work to be performed, required petitioner to supply to the Navy a set of reproducible drawings of all equipment developed under the contract. Article 17 of the contract required the petitioner to submit to the Navy Bureau of Ordnance, from time to time as requested, progress reports of work being accomplished. These reports were to make "full disclosure of all work done and the results thereof," and the Bureau of Ordnance was "at all reasonable times [to] have full access to the work being performed under this contract." In addition, "[a]t the completion of the task, *or at the termination thereof, if not complete,*" the contractor was to submit a complete report of work done, "together with working drawings and specifications of such prototypes, if any, as may have been developed." (Emphasis added.) Article 23, which gives the Government the right to terminate the contract "for the best interests of the Government," provides that in the event of termina-

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tion the contractor is obligated to transfer title and deliver to the Government "the plans, drawings, information and other property which, if the contract had been completed, would be required to be furnished to the Government." And the patent provisions of the contract also indicate that full disclosure was contemplated. The Government was granted a royalty-free license to practice each "Subject Invention," which was defined as each invention, improvement and discovery (whether or not patentable) conceived in the performance of this contract. Furthermore, the Government was granted "the right to reproduce, use and disclose for any governmental purpose, all or any part of the reports, drawings, blueprints, data and technical information to be delivered by Contractor to the Government under this contract; * * *." When these provisions are read together, when it is remembered that this was a contract for research and development and not for manufacture and sale, and when it is considered that there is no provision in the contract in any way limiting the disclosure to be made to the Government in the event of termination, the Government's right to the relief granted by the District Court appears clear.

The Government did not require progress reports from the petitioner to the fullest extent it might have done so under Article 17. As found by the trial court, this was "for the best interests of both the Contractor and the Government, to permit the Contractor to utilize his staff to proceed with the work, rather than to utilize his staff in the preparation of laboratory reports which apparently would have taken as

long to prepare as doing the work—perhaps longer" (R. 99). In addition, when the contract was terminated, the Government did not insist upon literal compliance with the requirements of Article 17 (b) for a final report; it agreed, at the petitioner's proposal, to allow him to submit a summary of work accomplished (R. 99). But this concession to the contractor's lack of facilities and lack of personnel was not intended, nor was it understood by the parties, to constitute a waiver of the Government's right to full disclosure. The District Court's finding in this regard is amply supported by evidence in the record which was reviewed in the court's first oral opinion (R. 100–105). Testimony at the trial established that it was the understanding of the parties that the technical recorded information would be made available and that the final report agreed upon would bridge the gaps in that recorded information. Indeed, that was the very reason for the Government agreeing to accept the short report. The petitioner indicated that he was willing to go along with this procedure, and agreed in his testimony that the report he submitted would not give a working knowledge of the system without supporting data. There is no reason to suppose that the Government, by accepting a shortened report, was at the same time foregoing the benefits of the work already performed under the contract to which it was otherwise entitled and for which it had expended many thousands of dollars.

There is nothing harsh or unusual in the result reached. The property rights which petitioner has in

the "know-how" in question were expressly protected in the court's decree (R. 119), as the Court of Appeals pointed out (Pet. 84). The petitioner was paid to produce this "know-how," and the risk that nothing of value would be developed was borne by the Government. The Government seeks only what it paid for, *i. e.*, the results of the research performed under the contract. The purpose of the contract was the creation of designs and inventions; the Government was not simply purchasing a company's product. Without the technical data in question, continuing work on the development of a bombing system begun here would be seriously hampered and would result in unnecessary duplication of effort and expense. The contract provisions in question were intended to protect the Government in this regard.

2. Petitioner again asserts, as he did before both courts below, that termination of the contract by the Government was arbitrary, in bad faith, and not in the best interests of the Government. Article 23 of the contract authorized termination in whole or in part "whenever for any reason the Contracting Officer shall determine any such termination is for the best interests of the Government" (App. 15). This clause confers a very broad discretion on the contracting officer, and his finding that termination of the contract is for the best interests of the Government (assuming *arguendo* that it is subject to any judicial review) must be accepted as final and conclusive unless shown to be "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to

imply bad faith, or is not supported by substantial evidence" (41 U. S. C. 321).[5]

The District Court allowed petitioner to reopen the trial to present his claim that the termination of the contract was not valid. After hearing extensive testimony by petitioner and considering the exhibits which he introduced, the court concluded that there had been no showing that the action of the Government was invalid for any of the reasons which would justify a court to set aside the decision made by appropriate authorities in the Department of the Navy. The Court of Appeals concluded that "the trial judge went fully into this matter and found that the action terminating the contract was taken in good faith and for proper reasons; and we are bound by this finding, as we would not be justified on the record in holding it to be clearly erroneous" (Pet. 84).

No purpose would be served by reviewing in detail here the evidence of record which led the Government to its decision. The sum of it is that the petitioner and the Navy were not able to agree on the scope of the interim project necessitated by budget

[5] 41 U. S. C. 321 (1952 ed., Supp. III) provides:

"No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however*, That any such decision shall be final and conclusive unless the same is fradulent [sic] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

limitations, and their negotiations in this regard later broke down into several areas of specific disagreement. When it became apparent that an understanding satisfactory to both parties could not be reached, the contract was terminated for the best interests of the Government (R. 94). At best, petitioner's claim is that the contracting officer made a mistake in not going ahead with the project. But the wisdom or correctness of that decision is, of course, not a matter properly within the province of a reviewing court.[6]

3. Petitioner's complaint with respect to the District Court's determination of the amount still owed to him under the contract does not warrant review by this Court. Obviously, the question is not of importance beyond the facts of this case. Furthermore, we believe that if the District Court erred at all, it erred in petitioner's favor in determining that he was entitled to be paid an amount in excess of the termination costs allowed by the contracting officer. Such costs were allowed for a period of seven months beyond the termination of the contract, and under Article 23 (d) (1) (App. 16) the contractor is entitled only to those termination costs approved by the contracting officer, provided his approval is not unreasonably withheld. The Court of Appeals did not

[6] And see *Ordnance Engineering Corp.* v. *United States*, 68 C. Cl. 301, 335: "A court would not be justified in indulging the inference that responsible officers of the Government arbitrarily invaded plaintiff's contractual rights and exercised a reserved right to cancel a contract because of personal animosity toward the contractor, unless the proof adduced to sustain the charge is extremely clear and free from irreconcilable conflicts."

even consider that petitioner's contention in this regard merited serious discussion.

4. Finally, petitioner asserts that the denial of his motion for a "mistrial" was error which should be reviewed by this Court.[7] Again, we believe such review is unwarranted because of the factual nature of the question and its lack of general importance. Moreover, we believe that the denial of this motion was an exercise of sound discretion by the district court. Petitioner was afforded a full opportunity to support this motion before the same judge who presided at the trial. The pertinent exhibits and documents were examined, petitioner's witnesses were called, and his arguments were heard (R. 22). The District Judge was able to observe at first hand the caliber of legal assistance which petitioner was receiving and concluded that his charge of inadequate representation was "entirely unwarranted by the facts" (*ibid.*). With respect to petitioner's charges that certain government exhibits were grossly erroneous or fictitious, the court stated that the discrepancies noted by petitioner presented no evidence of fraud and in any event were not sufficiently material to alter the court's findings (R. 23). Petitioner's

[7] While petitioner's motion was labeled a motion for a "mistrial," we assume it should be treated as a motion for relief from a final judgment under Rule 60 (b) of the Federal Rules of Civil Procedure. The motion having been made more than 10 days after entry of the final decree, it cannot be considered a motion for a new trial under Rule 59, and a Rule 60 (b) motion is the only other procedure available for the relief which petitioner seeks. See 6 Moore, *Federal Practice*, par. 59.09 [3] (2d ed. 1953).

claim of newly discovered evidence provided no reason for setting aside the judgment since they would not be of substantial help to his cause and were known to his counsel well before the case was terminated (R. 22–23).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. Lee Rankin,
*Solicitor General.*
George Cochran Doub,
*Assistant Attorney General.*
Samuel D. Slade,
Bernard Cedarbaum,
*Attorneys.*

March 1957.

## APPENDIX

1. Article 17 of the contract provides:

> (a) The Contractor shall submit to the Chief of the Bureau of Ordnance from time to time, as requested, progress reports in triplicate making full disclosure of all work done and the results thereof, provided that the Contractor shall not be required to submit reports more frequently than once each month during the term of the contract. The Chief of the Bureau of Ordnance, or his duly authorized representatives shall at all reasonable times have full access to the work being performed under this contract.
>
> (b) At the completion of the task, or at the termination thereof, if not complete, the Contractor will submit a complete report in triplicate of all work done and the results thereof, together with working drawings and specifications of such prototypes, if any, as may have been developed.

2. Article 23 of the contract provides in pertinent part:

> (a) *Notice of Termination of Contractor's Right to Proceed.* The performance of work under this contract may be terminated by the Government in whole, or from time to time in part, whenever for any reason the Contracting Officer shall determine any such termination is for the best interests of the Government. Termination of work hereunder shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract shall be terminated and the date upon which such termination shall become effective.

(b) * * * After receipt of a Notice of Termination and except as otherwise directed by the Contracting Officer, the Contractor shall * * * (6) transfer title (to the extent that title has not already been transferred) and deliver to the Government in the manner, to the extent and at the times directed by the Contracting Officer * * * (ii) the plans, drawings, information and other property which, if the contract had been completed, would be required to be furnished to the Government * * *

* * * * *

(d) In the event of the failure of the Contractor and Contracting Officer to agree as provided in paragraph (c) upon the whole amount to be paid to the Contractor in connection with the termination of work pursuant to this Article, the Government, but without duplication of any amounts agreed upon in accordance with paragraph (c), shall pay to the Contractor the following amounts:

(1) All costs and expenses reimbursable in accordance with this contract, not previously paid to the Contractor for the performance of this contract prior to the effective date of the Notice of Termination and such of these costs as may continue for a reasonable time thereafter with the approval of or as directed by the Contracting Officer (which approval shall not be unreasonably withheld) provided, however, that the Contractor shall proceed as rapidly as practicable to discontinue such costs.

* * * * *

3. Schedule A of the contract provides in pertinent part:

* * * * *

(f) A set of reproducible drawings, prepared to Bureau of Ordnance specifications, for all the equipments developed under this contract will be supplied to the Department of the Navy. Appropriate operating instructions will also be supplied.

4. The patents section of the contract provides in pertinent part:

* * * * *

(b) Contractor agrees to and does hereby grant to the Government an irrevocable, non-exclusive, non-transferable and royalty-free license to practice, and cause to be practiced for the Government, throughout the world, each Subject Invention in the manufacture, use and disposition according to law of any article or material, and the use of any method; provided, however, (i) that as respects any Subject Invention made by Technical Personnel employed by or under contract with the Contractor prior to the date of this contract, whom Contractor has in good faith endeavored to bring under agreement to pass, or giving Contractor the right to pass, to the Government the rights herein provided, and as respects any Subject Invention made by others than Technical Personnel, and as respects the practice of any Subject Invention in foreign countries, the said license and other rights hereinafter provided shall be to the extent of Contractor's right to grant the same; (ii) that nothing contained in this sentence shall be deemed to grant license under Contractor's Patent Rights; and, (iii) that with respect to any subcontract hereunder, Contractor's obligations under this article will be discharged upon its including in such subcontract a patent rights article not less favorable to the Government than as herein provided.

(c) Contractor agrees (i) to deliver to the Contracting Officer or his designee, promptly and in any event prior to final settlement, a complete written disclosure of each Subject Invention which reasonably appears to be patentable, and as to each such invention, to exert its best efforts to effect such delivery within six months after first publication, public use or sale; * * * (iii) to furnish to the Contracting

Officer or his designee, on request, copies or an irrevocable power to inspect and make copies of each patent application filed by or on behalf of the Contractor covering any Subject Invention; * * *

(d) Contractor agrees to and does hereby grant to the Government to the full extent of Contractor's right to do so, the right to reproduce, use and disclose for any governmental purpose, all or any part of the reports, drawings, blueprints, data and technical information to be delivered by Contractor to the Government under this contract; * * *.

MAR 18 1957

U. S. GOVERNMENT PRINTING OFFICE: 1957

MAR 18 1957
JOHN T. FEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

Donald M. Jacobs, doing business as THE JACOBS INSTRUMENT COMPANY, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

October Term, 1956
No. 752

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF

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1. Comments on Respondent's statement of "Questions Presented".

The petitioner has presented 12 questions to the Supreme Court for review. The respondent, in its Brief in Opposition, has replaced these questions with four of its own. The respondent's four questions cannot be accepted as reasonable substitutes for the questions presented by the petitioner, for they are inaccurate in factual content, and do not cover the topics covered by the petitioner's questions. Some important questions posed by the petitioner reach into areas which are not even remotely suggested by the respondent's questions. The petitioner categorically denies the validity of the questions posed by the respondent.

The petitioner has filed with this Court a Motion Ne Recipiatur, urging that the respondent's Brief in Opposition not be received because it is not responsive to the questions and issues presented in the original Petition. However, in spite of this motion, the petitioner feels that certain statements made in the Brief in Opposition call for comment, and such comment is offered herein.

2. Comments on Respondent's "Statement".

The Government's Statement opens with the sentence (Br. 2), "In April 1949, the United States entered into a research and development contract with the petitioner . . ." The statement that this was a "research and development contract" is inaccurate, and is important to this case. A research and development contract is one whose object is the performance of research for the general pursuit of knowledge. Such contracts are entered into by the Government either for the express purpose of obtaining the results of research into certain subjects, or to educate the research organization in a specified field which is of interest to the Govern-

ment. The contract may, or may not, call for disclosure of research results in its Schedule (see statement by Attorney General on this subject, Pet. 68). The instant contract was entered into after the petitioner had conceived a new type of bombing system (electronic bombsight) and performed the initial engineering on it, all at his own expense. The task assigned in the Schedule of the contract was: "Conduct research in connection with, develop, design, construct and test a (deleted) bombing system incorporating the JAINCO ground and airborne position determining elements." (The JAINCO equipment was a precision navigational system conceived by the petitioner, and obtained its name from The JAcobs INstrument COmpany). It is to be noted that the contract had as its object the construction and test of a bombing system based on the petitioner's navigational system. It is further to be noted that the instant contract reserved all rights in this system to the petitioner by a clause which states:

> "The inventions described in Patent Application No. 60,731, filed on 18 November 1948 by Donald H. Jacobs, and entitled "Position Finding and Distance Measuring Systems", shall not be considered as Subject Inventions under this contract. The expression "Contractor's Patent Rights" will be understood to include all rights the Contractor has to the aforementioned Patent Application and to any Patent or Patents which may be issued based upon disclosures made in the aforementioned Patent Application."

Hence it is clear that this was a contract for the design and construction of a bombing system. It is true that a good deal of research and development work had to be performed in order to approach the goal stated in the contract, but this was incidental to the task assigned by the contract. The significance of this is that some disclosure of technical data is sometimes made in research contracts, but only very rarely with design contracts. Whatever disclosure is intended is specified in the Schedule, for all these research and design contracts have identical boiler plates according to Government testimony in this case. As a matter of fact, even when the highest degree of disclosure is required by the Schedule, this consists of periodic progress reports plus a final report. The contract never provides for the pillaging of the files of the contractor. The specific disclosure required by the Schedule in the instant contract will be discussed, infra.

The respondent's brief states (Br. 2-3), "The termination was prompted by the inability of the parties to reach agreement with respect to several non-technical matters during the course of negotiations for curtailing the original scope of the contract because of budgetary limitations." This is the same assertion used by the

Dept. of Justice before the Court of Appeals. The interesting thing about it is that it is completely at variance with the sworn testimony of the Navy, given during the trial. The Navy's story was thoroughly exploded by evidence introduced by the petitioner, and the Dept. of Justice has now, after the trial, evolved a completely new story. The facts and evidence bearing on this matter are reviewed in the Petition, pp. 31-43.

The respondent states (Br. 3) that "In the letter of termination the Government called for the return to it of . . . a master index of drawings, and various drawings, notebooks, memos, and studies . . .". (Emphasis added) By the use of the word "return" the respondent seeks to imply that this was property that was loaned to the petitioner by the Government. This is not correct. All the technical data at issue was the property of the petitioner, purchased and generated by him.

The respondent states (Br. 3), "Negotiations for settlement of these questions continued, and the Government paid monthly termination costs until February 25, 1954, when the contracting officer notified the petitioner that such costs would no longer be allowable and reimburseable. The suit was then instituted . . .". Actually, the Government first cut off termination costs on February 25, 1954, then entered into discussions concerning settlement of property matters in March 1954, and filed suit in June 1954.

The respondent states (Br. 3) that the first three counterclaims related to costs of protection and storage of property and data. This is inaccurate, for these counterclaims referred to the costs incurred in carrying out all obligations laid upon the petitioner by the contract, and include numerous administrative and related costs. All costs involved in these counterclaims are allowable under the terms of the contract.

The respondent asserts (Br. 4) that ". . the court held . . . that petitioner's second defense, that the termination of the contract was invalid, should be flatly rejected . ." While it is true that the District Court rejected this defense, the use of the adjective "flatly" is a decided exaggeration. Actually, the Judge stated (R. 127) ". . I do not mean for a minute to belittle or to question Mr. Jacobs' entire good faith in this matter." and (R. 127) ". . . I know how frustrating it can be to get into a situation where a government department, and particularly

the military branches of the government, maneuvers a person into the sort of situation in which Mr. Jacobs found himself." and (R. 116) "If it were purely a scientific matter, I think any person on the evidence here would have to agree that Mr. Jacobs is right . . .". and (R. 117) "We have a system here (i. e., in the U. S.) which has been built up over the years, and no one would claim that its principal purpose or virtue is efficiency." and ". . . I certainly do think it could have been handled in a much wiser way from the very beginning by the Navy." and ". . I am very sympathetic with Mr. Jacobs position and his desire to do a good job and with his feeling that what was proposed was so poor compared with what he might do that he had to fight to the last minute to have the government adopt the better program."

Finally, the Judge stated (R. 130-1),

> "I do not think you can say that Mr. Jacobs' fears were unfounded or improper. There were people who came to him from business who said things, some of which I think are admissible in evidence and some of which are not, from which you could draw inferences that some people in the government's employ were deciding questions or were pressing matters on improper grounds; but I think there is no basis for the Court to find that the final decision in this case was made on any such basis."

Later, at a hearing on a motion for a new trial, the petitioner introduced new evidence, which had just come into his possession, that showed conclusively that the termination was linked directly with his rejection of the Navy's violent attempts to force him into a giveaway merger. This was admitted by the District Judge, who then took the position that the termination was proper punishment for the petitioner's "intransigence" in refusing to give away the entire fruits of his professional career.

The respondent's description of the issues raised by the petitioner in his appeal to the Court of Appeals (Br. 5) is inaccurate in the same way that the respondent's statement of the "Questions Presented" is inaccurate: the issues, and their scope and significance are not properly stated. The issues raised by the petitioner in the Court of Appeals were the same as the issues presented by him to this Honorable Court for resolution, and the questions presented by the respondent are only tenuously related to these.

3. Comments on Respondent's Argument.

The respondent's argument is responsive only to the fictitious questions presented by the respondent, and is not responsive to the questions raised by the

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petitioner. The respondent argues (Br. 6) that its fictitious questions "relate solely to a determination of certain rights of the parties under the contract here involved and to the factual circumstances surrounding the termination of the contract by the Government." The petitioner will not waste time arguing the merits of fictitious questions which have not been properly raised, and are not before the Court for consideration. The questions raised by the petitioner involve extremely important issues of Constitutional Law. The petitioner has been assured by legal representatives of the Aircraft Industries Association, the National Association of Manufacturers, the National Security Industrial Association, and the Automobile Manufacturers Association that issues raised by him are of the greatest concern to them, for their interests are directly threatened by the actions of the courts below in this case.

Specifically, the questions raised by the petitioner fall into the category of Rule 19 (1)(b), "Where a court of appeals has . . . decided an important question of federal law which has not been, but should be, settled by this court; . . . or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

While the petitioner will not argue the merits of the respondent's fictitious questions, he will discuss the statements made by the respondent in his argument.

The respondent quotes a statement of the District Judge (Br. 6) that the provisions of the instant contract "undoubtedly give the Government the right to examine, study, copy, photograph, and use all of the writings, for any purpose covered by the contract". The Judge, however, was never able to point to any contract clause or clauses in support of this statement, for there are none. Early in the proceedings in the District Court, the Judge stated, after studying the contract closely, that nothing in it gave the Government any right to the relief sought. It was only after the Government made strong assertions of need of the relief sought that the Judge made the assertion quoted by the respondent, although he never indicated the clause of the contract on which he relied. The Court of Appeals relied solely on the Termination Article, 23(b)(6), which is quoted on p. 84 of the Petition, and which obviously does not grant the relief sought by the

Government. The Court of Appeals clearly felt that the contract did not justify this relief, for it attempted to shore up its position by asserting, "Furthermore, it is clear that, without regard to the contract, the government is entitled to the benefit of all knowledge gained by the contractor in the course of the research for which the government was paying him." (Pet. 84). This statement has been challenged in one of the questions presented by the petitioner.

With respect to the instant contract, it is pointed out that, like all government development contracts, it consists of two parts: a Schedule and a "boiler plate". The Schedule outlines the specific task assigned the contractor, and the boiler plate contains the standard contract clauses common to all such contracts. The Government's contract expert testified, during the trial of this case, that the boiler plate in the instant contract was the same as those issued to all other organizations engaged in this type of work. The boiler plate clauses have been in use for many years, but the Government has never before attempted to distort them so as to demand either voluntary delivery or involuntary seizure of technical data. That is the reason this case is without precedent. If these clauses do actually justify the seizure of technical data, the Government has been remiss for many years in its dealings with all its contractors, and is currently remiss in its dealings with its big-business contractors.

A specific example of the working of the standard boiler plate is given by Contract NOrd-10471, which was a contract between the Navy and the petitioner which was completed prior to the instant contract. This contract had the same boiler plate as the instant contract. Yet during the entire duration of Contract NOrd-10471, no disclosure was demanded of the petitioner, who did, however, voluntarily provide the Navy with some memoranda from his files, exactly as in the instant case. The Navy was overjoyed at receiving these memoranda, and clearly felt that the petitioner had more than fulfilled his requirements for technical disclosure.

With respect to the specific disclosure of technical data demanded by the Schedule of the instant contract, it is pointed out that the Schedule contains the following sentence:

> "A set of reproducible drawings, prepared to Bureau of Ordnance specifications, for all the equipments developed under this contract will be supplied to the Department of the Navy."

This clause could have been carried out in either of two ways. Such drawings could have been prepared by a large staff of draftsmen during the progress of the work, and the drawings could have been continually modified, as the bombing system progressed through various evolutionary stages, until the end of the project at which time a set of drawings would have been ready. This, however, would have been a costly way of carrying out this assignment, for it would have involved the full-time efforts of a large staff of draftsmen during the entire period of performance of the work. However, no funds were ever allocated for such a staff. Instead, another and more sensible method of carrying out this clause was agreed upon by the Navy and the petitioner. This agreement provided that none of these drawings would be prepared until the equipment was in final form, and then a single set of final drawings would be made. However, the contract was terminated by the Navy before the equipment was brought to its final form, so preparation of these drawings was never started. (The drawings in dispute in this action are confidential company working drawings, and are not "prepared to Bureau of Ordnance specifications", and the Navy has never claimed that these company drawings had any relationship to the drawings called for in the Schedule).

Because the Termination Article of the contract calls for the delivery, at termination, of "the plans, drawings, information and other property which, if the contract had been completed, would be required to be furnished to the Government", the petitioner offered at the time of termination to prepare a complete set of drawings, of all equipment developed under the contract, for the Navy (R. 32-33). This offer was rejected by the Navy (R. 32-33).

Turning now to the boiler plate clauses, it is noted that the respondent alleges (Br. 7) that pertinent contract provisions are reprinted "in full" in the Appendix to its Brief. This is obviously incorrect, for the provision of the patent article which eliminates the contractor's JAINCO navigational system from the working of various provisions of that article has been thoughtfully deleted. That clause has already been quoted, supra (p. 2).

The respondent's brief quotes (Br. 7) Article 17(a), which relates to disclosure of technical data during the performance of the contract, and Article 17(b), which relates to post-termination disclosure. Article 17(a) was obviously cut off

by the termination of the contract by the Navy. The clearest statement as to the working of that article was provided by the Chief of the Bureau of Ordnance, who officially informed a Senate committee, shortly after termination (Def. Ex. 21), as follows:

> "It should be noted, however, that while the research and development contract called for drawings prepared to Bureau of Ordnance specifications and progress reports, from time to time, making full disclosure of all work done and the results thereof, the Bureau of Ordnance, realizing the limited number of the personnel of the company and the time and cost involved in preparing such in customary form, accepted selected company working memoranda for files in lieu thereof from time to time." (Emphasis added).

There is no doubt but that the petitioner carried out his obligations under Article 17(a) to the full satisfaction of all concerned during the working of the contract. This point will be discussed further, infra. It is also to be borne in mind that there existed a specific covenant that no attempt would be made by the Government to gain access to technical information in the company's files, either that generated under the contract or that generated prior to the contract or in connection with non-contract work. This covenant was strictly observed by the Government until the time of termination was approached.

The contract clause which relates to post-termination disclosure is Article 17(b), which obligates the contractor to submit a report of the work done under the contract and "working drawings and specifications of such prototypes, if any, as may have been developed." Because of this the petitioner offered the Navy its choice of (a) a summary report or (b) a longer report with some drawings, or (c) a longer report with drawings of all equipment built (R. 32-33). The Navy chose the summary report (R. 32-33), and rejected the offer of a longer report and also rejected the offer of the petitioner to prepare drawings for the Navy, and it now has the effrontery to try to pilfer the contents of the petitioner's files on the theory that the petitioner did not live up completely to his contract obligations! The summary report which was actually delivered was 200 typewritten pages in length, and was pronounced by the cognizant Government representative to be more than was expected.

In its Brief, the Government cites portions of the Patent Article of the contract (Br. 8), although a major portion of the work done under the contract was excluded from the working of that article by the contract provision specified

earlier, and in any event, the working of the article is, for the most part, concerned with patent licensing, which has no relationship to technical disclosure. The article does call, however, for a disclosure of patentable inventions. This requirement, however, cannot be used to justify the decrees, for the decrees, by their express terms, do not act to relieve the petitioner of this responsibility. This is discussed further, infra. There is one other section of the article that does relate to disclosure, however, and that is the section which gives to the Government "the right to reproduce, use and disclose for any governmental purpose, all or any part of the reports, drawings, blueprints, data and technical information to be delivered by Contractor to the Government under this contract; . .". This clause was reasonable enough when applied to the technical data whose delivery was contemplated by the parties when the contract was signed, and which was called for by the contract. But when applied to the mass of technical data in the company files which was seized by the Government under the decrees of the District Court, it is horrifying indeed, for it gives the Government a license to use these data "for any governmental purpose". [illegible] outrageous about the contract clause itself, but when that clause is combined with the decrees at issue, the result is outrageous indeed. The difficulty arises, of course, not from the contract clause, but from the decrees.

The Government apparently agrees that none of the contract clauses grant the relief sought by the Government, but takes the position that they must be "read together" (Br. 8)! In other words, the respondent admits that the contract does not authorize the relief it desires, but feels that it implies some sort of philosophical justification for this relief. If the Government wants this dispute settled on the grounds of philosophical justice, the petitioner has a number of such measures of relief he could seek, too. As for reading the contract clauses together, the respondent does not point out what mystic effect this is supposed to produce over reading them in sequence.

The Government also seeks to justify the relief sought by arguing (Br. 8) that "there is no provision in the contract in any way limiting the disclosure to be made to the Government in the event of termination . .". Aside from the legal weakness of this argument, there is the clear and obvious point that the amount of

disclosure to be made after termination was the subject of negotiation and a final agreement, all of which was in writing, and which appears in the Record at pp. 32-34. The petitioner lived up to his end of this formal agreement in all respects, but is still trying, via his counterclaims, to get reimbursement from the respondent for the costs incurred in carrying out this agreement. He received not one cent of fee for this work.

The respondent incorrectly alleges (Br. 9) that upon termination the Government did not insist on a final report but agreed "at the petitioner's proposal", to allow him to submit a summary of work accomplished. As the record shows, the Government elected (R. 32-34) to select the shortest of three possible lengths of report proffered by the petitioner. And this report was some 200 typewritten pages in length and was exceedingly detailed and clear, and it was accepted (R. 40). In addition the petitioner voluntarily turned over some 1,000 of his confidential company working drawings to aid the respondent in carrying on the project, although he was not obligated to do so.

The respondent alleges (Br. 9) that the Government's election of the shorter report was a "concession to the contractor's lack of facilities and lack of personnel." This statement is without foundation in fact. The respondent, after making it, immediately contradicts it (Br. 9) by asserting that the Government's election of the shorter report was based on its assumption that it would be given access to the petitioner's technical data files, and hence it did not need a longer report. This statement is also clearly erroneous, for during the preparation of the report the petitioner informed the Government that it would not be given access to his technical data files. In spite of this, he was not requested to prepare a longer report, as he had offered to do.

The respondent alleges (Br. 9) that the petitioner testified that the report submitted "would not give a working knowledge of the system without supporting data". This is not true. The petitioner testified fully concerning the report submitted, and took the position that it was full and complete, and gave a good working knowledge of the system, and could be fully and perfectly understood without supporting data. On the other hand, he did not claim, and never has claimed, that the report revealed everything that the petitioner had done and learned in connection with the contract, for that would require a tremendously long report, and

such disclosure was not required by the contract. Nor does he claim that the report he submitted discloses everything that he was willing to disclose -- he offered to write longer reports and this offer was rejected. But he does claim that the report submitted was full, complete, and completely understandable without any supporting data, and was received with pleasure by the Navy. The Navy tried to bring pressure to bear on the petitioner, during the preparation of the report, to make it even shorter, and at one time completely cut off the petitioner's monthly reimbursement for expenses in an attempt to force him to hurry work on the report. But he refused to be hurried in spite of the tremendous financial pressure, and insisted on doing a thorough and workmanlike job. This is all clearly stated in the trial testimony. The petitioner desired to have this report presented in evidence, but the Government objected to this on the grounds of security. It seems to the petitioner that it is unfair of the respondent to make false statements concerning a report which was withheld from evidence at the respondent's request.

The respondent alleges that the Government's acceptance of the final report did not relieve the petitioner of his obligations toward disclosure. Yet the Record clearly shows that the petitioner asked the Navy whether the final report would discharge the petitioner of his obligations under the disclosure Article (R. 33), and the Navy replied (R. 34) that the report would discharge the petitioner of his obligations under Article 17 if it covered the topics in an outline which the petitioner showed the Navy. The trial judge read the report and made this finding: "The report was prepared along the lines of the outline submitted to the Government and accepted by the Government." (R. 5). In view of the foregoing facts it is perfectly clear that the petitioner discharged all his obligations under Article 17, and that this has been clearly shown in the Record.

The respondent asserts (Br. 9), "There is nothing harsh or unusual in the result reached." The Government asserts (R. 41) that the bombing system conceived and brought near completion by the petitioner is "necessary and vital to the national defense of the United States." And the cognizant Navy project officer testified that The Jacobs Instrument Company was considered by the Navy, at the time of termination, to be the only company qualified to carry the project through to completion. Yet this company, when it refused to accede to a giveaway merger, had its contract terminated and its research and development organization completely

destroyed by the respondent, who now seeks to seize the contents of the company's files. In all this the respondent insists that "there is nothing harsh or unusual". It apparently all depends on the point of view. We wonder if the respondent would feel the same way if all this had happened to General Motors.

The respondent alleges that the court's decrees protected the petitioner's property rights in its "know-how", and points to a comment of the Court of Appeals to this effect. Specifically, the Court of Appeals said (Pet. 84), "In this connection, it should be noted that the patent rights of the contractor and his rights in non-patentable 'subject inventions' including 'methods of construction, processes of manufacture, construction techniques, trade secrets and other know-how' were protected by the decree . . .". The excerpt from the decree sounds as if it does offer protection until one notes that the Court of Appeals quoted a few words out of the decree without placing them in context. Actually this section of the decree reads (R. 15):

> ". . . the provisions of this paragraph II of this Decree shall not operate in any way . . . to deprive the defendant of any property rights which he may have in non-patentable 'subject inventions' in the form of property rights in and to methods of construction, processes of manufacture, construction techniques, trade secrets, and other know-how except to the extent that plaintiff may have acquired property rights by virtue of Contract NOrd-10531, and to the extent that such property rights may be limited or qualified by the disclosure of documents required by this Paragraph or by the provisions of Article 23(b) and paragraph (d) of the Patent Provisions of Contract NOrd 10531; and provided further that the provisions of this paragraph II of this Decree shall not discharge any of the obligations of the defendant under the Patent Provisions of Contract NOrd 10531, including but not by way of limitation, the obligations of the defendant to grant the United States licenses to patentable inventions, to designate, list and make disclosure to the United States of 'subject inventions' and to grant the United States the power to inspect all patent applications, subject to the proviso contained in paragraph (d) of said Patent Provisions." (Emphasis added).

There are two interesting points with regard to this excerpt. In the first place it is clearly evident that it gives no protection whatever to the defendant's technical data and know-how, for it was the position of the Government and the Court that everything in the defendant's files prepared in connection with or in anticipation of the instant contract was subject to disclosure, and the Government was given the right to search the petitioner's entire plant for technical data. The second point is that this decree expressly does not operate to relieve the petitioner of any obligations for disclosure inherent in the Patent Article. The petitioner is still obligated to make such disclosure as one of the conditions precedent to receiving

the one-third of the counterclaim award (R. 21). Hence the Patent Article cannot be cited as authority for justifying any of the search and seizure which took place under the court's decrees.

The respondent asserts that "the risk that nothing of value would be developed was borne by the Government." This is certainly without foundation in fact. There was actually a joint risk. The Government kept its risk very small by putting money into the contract by small amounts. The contractor, however, devoted the efforts of his organization to this work for five years of Navy contracting, plus nearly a year on its own funds before contracting with the Navy. The Navy work was undertaken with the specific assurance that no attempt would be made to acquire either company-owned technical data, nor that generated under the contract (beyond that specified in the Schedule), and that the company would be given an equitable share of any production that might follow if the work were successful. The Navy obviously is not going to honor its promise with respect to production, and is attempting to violate its promise on technical data in this suit. The contractor was also paid a small fixed fee, but this was converted into a large net loss by the trial court's action in awarding only one-third of the counterclaims (and that third remains unpaid). It is evident that essentially all the risk was borne by the petitioner, who lost all the foregoing, and his research organization and a useful career as well. In addition, he is now being squeezed financially by the Government in other suits.

The respondent asserts (Br. 10) that "the purpose of the contract was the creation of designs and inventions . .". This is not correct. The Mark 6 bombing system had been conceived and invented by the petitioner at his own expense before he did any contracting with the Navy. The purpose of this contract was not basically the "creation of designs and inventions"; it was the bringing into physical existence of a bombing system which had already been invented, as is stated clearly in the Schedule. However the Government was granted a license to the use of all inventions which were developed incidental to this task, and disclosure of such inventions is also provided for in the contract and in the decrees.

The respondent states (Br. 10), "Without the technical data in question, continuing work on the development of a bombing system begun here would be seriously hampered . . .". Both the premise and the conclusion here appear incorrect. From

the time of the termination of the contract (June 1953) until it was relieved of its authority to contract for aircraft fire control equipment early in 1956, the Bureau of Ordnance never showed any interest in the continuation of work on the Mark 6 system, although it was urged to continue this work by the Senate Armed Services Committee and the White House. Responsibility for this type of work has now been transferred to the Bureau of Aeronautics, which also has shown a complete lack of interest in this project. All the interest in the acquisition of the contents of the petitioner's files appears to emanate from certain big corporations. If the Navy had been interested in continuation of the work, it could have been completed years ago. And if the Navy had been interested in acquiring the desired technical data in lawful ways, for honest purposes, it could have acquired these data a long time ago. And these facts are well known to the respondent and the respondent's counsel.

The respondent points out that the findings of the contracting officer regarding the desirability of termination must be accepted, under 41 U.S.C. 321, unless shown to be "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." The

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necessarily to imply bad faith, or is not supported by substantial evidence." The petitioner particularly calls the court's attention to the last of these requirements.

The respondent quotes the Court of Appeals, on the issue of invalid termination, as stating (Br. 11) that "the trial judge went fully into this matter and found that the action terminating the contract was taken in good faith and for proper reasons . . .". The petitioner questions the statement that "the trial judge went fully into this matter . . ." in view of the fact that the petitioner was required to present his defense on this subject without counsel, without witnesses, and with only two days of preparation. In addition the U. S. Attorney kept making technical objections to the testimony and blocked out large portions of the evidence. The petitioner, being involuntarily without counsel, could not defend himself against these technical objections. Finally even the trial judge misquoted the rules of evidence to the naive defendant in order to suppress vital testimony. It is to be noted that after testimony by the defendant (without supporting witnesses, as requested by him), the trial judge found that the Navy had acted improperly, but professed an inability to see a connection between the improper activities and the

termination of the contract, although they occurred simultaneously. When new evidence, which had just come into his possession, was introduced by the defendant at a hearing on a motion for a new trial, the defendant was able to prove conclusively with Navy documents that there was a direct connection between the improper activities (which related to attempts to force a no-reimbursement merger on the defendant) and the termination. At this point the trial judge admitted the connection between the two, but took the position that the defendant's "intransigence" in refusing to agree to a giveaway merger was a proper reason for termination. The defendant takes issue with this conclusion.

The respondent asserts (Br. 11) that "the petitioner and the Navy were not able to agree on the scope of the interim project necessitated by budget limitations . .". This statement is not factual, as is shown clearly by the trial testimony and evidence. It even directly contradicts the Government's own sworn testimony. The respondent also asserts that the validity of the termination is not within the province of a reviewing court (Br. 12). This assertion appears to be in contradiction to the provisions of 41 U.S.C. 321 (Br. 11).

The respondent quotes (Br. 12) a Court of Claims decision to the effect that a court would not be justified in overturning a contract termination which occurred "because of personal animosity" unless the proof is extremely clear. In the instant case there is no allegation of personal animosity, and the proof as to what actually happened is unquestionably clear.

The respondent argues (Br. 12) that the petitioner's complaint with regard to the determination of the amount of the counterclaims does not warrant review because it is purely a question of fact. Without commenting on the respondent's argument, the petitioner points out that important issues of due process are involved in this determination. The amount of the counterclaims was determined after about one hour of hearing, during the one day of the trial when he was represented by counsel who had withdrawn, and had been forced back into the petitioner's service by the judge.

The respondent claims (Br. 13) that there is no justification for this Court to review the denial of the petitioner's motion for a new trial, for the respondent alleges that this is purely a question of fact, and one lacking in general importance. The petitioner feels that the question is one of due process, and he feels

that justice in the abstract, and the methods employed in the Federal Courts are of great general importance and involve both Constitutional rights and the supervisory power of the Supreme Court over the lower courts. With regard to the caliber of legal assistance received by the petitioner from his counsel, he takes the position that lawyers who withdraw from a defendant's service at the instant they are called upon in Court to present his defense are not properly fulfilling their duty, although the District Judge felt otherwise and would not even grant a continuance for the obtaining of other counsel. This may or may not be reasonably considered to be due process of law: it is a matter on which this Court can reasonably be expected to have an opinion.

The respondent also points out (Br. 13) that the trial judge alleged that the differences between the Government exhibits and correct exhibits were not sufficiently material to alter the court's findings. However, by the time the petitioner was able to get the correct versions before the court, and show the really major inaccuracies contained in them, the court had already signed its decrees, and the decrees had been carried out, and the Court was clearly most reluctant to admit it had erred, and did not wish to be burdened with the problem of correcting the damage it had wrought. Hence during this hearing the court defended its position in a most violent fashion. A much clearer picture of the proceedings can be obtained by reviewing the facts (Pet. 55-58) or the Transcript rather than by reading a few words from the opinion the court rendered from the bench on this occasion.

b. Summary of Contract Points.

The various articles in the contract which relate to technical disclosure have been discussed extensively in the Petition, and in this Brief. The petitioner's position on the various contract clauses can be summarized as follows:

Schedule A

The set of drawings, "prepared to Bureau of Ordnance specifications", called for by this clause was never prepared because of agreement between the petitioner and the Navy that this work would not be initiated until the equipment was in final form, and the contract was terminated by the Navy before the equipment reached that stage. The petitioner's offer (R. 32-33) to prepare drawings after termination (of such equipment as had been developed) was rejected by the Navy (R. 32-33).

Article 17. (Reports of Work)

The defendant fully discharged all obligations under this article, as is clear from the Navy letter of 24 August 1953 (R. 34), by preparing his final report. As the trial judge stated (R. 5), "The report was prepared along the lines of the outline submitted to the Government and accepted by the Government."

Patent Article.

This clause calls for the disclosure of all patentable inventions developed under the contract. However, the decrees under review expressly state that they do not relieve the petitioner of his obligations under this clause (R. 15), and the petitioner is required to discharge those obligations as one condition precedent to his obtaining the counterclaim aware (R. 21). Hence the patent article cannot be used as justification for search and seizure of technical data.

Article 23. (Termination by the Government)

This article requires the contractor to deliver, after termination, ". . the plans, drawings, information and other property which, if the contract had been completed, would be required to be furnished to the Government." This relates back to the requirements under Schedule A. However, the petitioner's offer to prepare, after termination, the drawings called for by Schedule A and Article 17(b) was rejected by the Navy (R. 32-33).

5. Comments on Property Rights.

It is the position of the petitioner that property rights are vested in technical data (see, for example, 42 Am. Juris. 192), and that the technical data in this case are his sole and exclusive property. The respondent takes issue with the latter position, and argues (Br. 10), "The Government seeks only what it paid for, i. e., the results of the research performed under the contract." The respondent's argument is apparently based on the fact that the Government reimbursed the petitioner for some of the costs of performance of the contract. However, this reimbursement is specifically stated by Article 5(a) of the contract to be part of the compensation which was to be paid the petitioner for the performance of the task assigned by the contract. The question, then, is: does the government own property purchased by the petitioner with his compensation for

his work? The government's theory that it does own this property is based on a doctrine which has been described as "once a government dollar, always a government dollar." Under this doctrine the house and furnishing purchased by a Government employee with his salary are the property of the Government. The theory obviously has legal weakness and evil implications.

6. Conclusion.

In view of the matters discussed herein and in the Petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Donald H. Jacobs

15 March 1957

JOHN T. FEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

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|---|---|---|
| Donald H. Jacobs, doing business as THE JACOBS INSTRUMENT COMPANY, Petitioner | : | |
| v. | : | October Term, 1956 No. 752 |
| THE UNITED STATES OF AMERICA, Respondent | : | |

On Petition for a Writ of Certiorari to the U. S. Court of Appeals for the Fourth Circuit

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MOTION TO PROCEED ON TYPEWRITTEN MATERIAL

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The petitioner herein again moves for permission to proceed on typewritten material, and as a basis for his proceedi[illegible] makes the following allegations:

1. On 31 January 1957 the petitioner herein mailed a motion to proceed on typewritten or similar matter to this Court. This motion was granted on 25 March 1957.

2. The petition for certiorari filed herein was denied on 25 March 1957, and the petitioner therefore had until 19 April 1957 to file a petition for rehearing. This petition for rehearing was prepared in typewritten form under the authority which the petitioner understood to have been granted under the circumstances outlined in the preceding paragraph. The said petition for rehearing was mailed to this Court on 15 April 1957.

3. On 17 April 1957 the petitioner received a telephonic communication from the office of the Court Clerk in which he was advised that the earlier grant of permission to proceed on typewritten material did not extend to a petition for rehearing, and that this petition must be printed or a new motion for permission to proceed on typewritten material would have to be filed. Inasmuch as this information was received too close to the cut-off date for serious contemplation of the problems involved in printing the petition for rehearing, the petitioner moves the Court for permission to file the petition for rehearing in typewritten form.

Donald H. Jacobs

18 April 1957

I HEREBY CERTIFY that a copy of the above motion has been served on the United States by the mailing of a copy thereof, with first class postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C., on 18 April 1957.

Donald H. Jacobs

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IN THE SUPREME COURT OF THE UNITED STATES

APR 19 1957
JOHN T. FEY, Clerk

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|---|---|
| Donald E. Jacobs, doing business as THE JACOBS INSTRUMENT COMPANY, Petitioner | |
| v. | October Term, 1956 No. 752 |
| THE UNITED STATES OF AMERICA, Respondent | |

On Petition for a Writ of Certiorari to the U. S. Court of Appeals for the Fourth Circuit

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## PETITION FOR REHEARING

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT:

The petitioner respectfully prays for a rehearing on his petition for a writ of certiorari, and as a basis for this petition makes the following allegations:

1. The petition for a writ of certiorari was denied in an order dated March 25, 1957. In a letter dated March 26, 1957, the petitioner was advised by the Clerk of this Court that Justice Whittaker took no part in the consideration or decision of this matter. Hence the petitioner had a reduced opportunity to obtain the required four votes for certiorari. Reconsideration at this time would presumably increase his chances of obtaining the necessary four affirmative votes.

2. The contract clauses in dispute in this action are not restricted to the contract between the petitioner and the Government, but are common "boiler plate" clauses which are incorporated, by virtue of the Armed Services Procurement Regulation, in nearly all design and research contracts. The decisions of the courts below make a radically new interpretation of these clauses -- an interpretation which has not only had extremely serious consequences for the petitioner but which will have a like effect on other firms in the area field.

3. The opinion of the Court of Appeals, holding that regardless of the contract terms, anything done by a Government contractor belongs to the Government, is a most violent departure from current practice, and violates legal and equitable considerations. It is certainly going to have a disastrous effect on Government contracting, for it will cause much harm both to the Government and to its contractors.

WHEREFORE, the petitioner prays that his petition for a writ of certiorari be reconsidered, and that the petition be granted.

Donald E. Jacobs

15 April 1957

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## CERTIFICATE

The petitioner certifies that this petition is presented in good faith, and is not intended for delay -- the mandate in this case has already issued. He further certifies that this petition for rehearing is restricted to the grounds above specified.

15 April 1971

Donald H. Jacobs